SUPREME COURT, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 221

HUBERT RAY STIDHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND FOURTH DISTRICT COURT OF APPEAL, FLORIDA

JOHN M. McCANTS
301 Blount Building
Fort Lauderdale, Florida
Counsel for Petitioner

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Petitioner prays that writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above entitled case on February 14, 1968, (A. 11) and the judgment of the District Court of Appeal, Fourth District of Florida, entered on November 14, 1967, (A. 1) rehearing in which was denied by said Court on December 13, 1967, (A.8).

CITATION TO OPINION BELOW

The opinion of the Fourth District Court of Appeal of Florida and order denying petition for rehearing are reported in 204 So.2d 359. The opinion of the Supreme

Court of Florida has apparently not been published in the official reports by the West Publishing Company. The record in this case is lodged with the Circuit Court of the Ninth Judicial Circuit in and for St. Lucie County, Florida.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Fourth District was entered on November 14, 1967 and that of the Supreme Court of Florida on February 14, 1968. Petitioner's application for extension of time within which to take certiorari to this Court was granted on May 22, 1968 and Petitioner given to and including June 15th, 1968 within which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3), since a right and privilege is claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether the Appellate Courts of Florida denied Petitioner due process of law and his right to trial by jury in affirming a conviction of murder in the third degree upon the ground that in their opinion the jury could have found Petitioner guilty of murder in the second degree, when there was patently no evidence at all to support a conviction of murder in the third degree, the jury has found Petitioner innocent of murder in the second degree and the Appellate Courts' finding as to possibility of guilt of second degree murder was wilful, purely speculative and based upon no substantial, competent evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein is that part of the 14th Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty or property without due process of law", that portion of the Sixth Amendment of the Federal Constitution which provides that "In all criminal prosecutions, the accused shall enjoy the right to *** trial by an impartial jury ***," and that portion of the Seventh Amendment to the U. S. Constitution which provides that " *** no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

STATEMENT

Petitioner was indicted (S.A. 1) for murder in the first degree together with James Dale Purkhiser, John Philemon Luke and John Francis Henry in Broward County, Florida for the premeditated killing of one Catalina Flores, an 11 year old Puerto Rican girl. James Dale Purkhiser, who did the shooting which resulted in the death of the decedent, was tried separately on motion of other defendants, found guilty by jury without recommendation of mercy and sentenced to death in the electric chair. On direct appeal to the Supreme Court of Florida, this conviction was reversed and the lower court directed to enter judgment of guilty of second degree murder for the reason that there was in the opinion of the Supreme Court of Florida *insufficient evidence of premeditation* to support a judgment of first degree murder. This opinion has not been officially published but a copy of that issued in mimeograph form by the office of the clerk of the Su-

preme Court of Florida is attached hereto in the Supplementary Appendix (S.A. 2).

Petitioner and the other two co-defendants were tried at their request in St. Lucie County by jury. At the conclusion of the State's case, the Court directed a verdict in Defendant's favor as to first degree murder but let the case go to the jury on charges of second degree murder, third degree murder, manslaughter and not guilty at the conclusion of the trial. The jury found Petitioner and his two co-defendants, Luke and Henry, innocent of second degree murder but guilty of third degree murder.

Petitioner appealed to the District Court of Appeal of Florida, Fourth District, contending among other things that there was no evidence at all to support a conviction of third degree murder. The State conceded that there was no evidence to support murder in the third degree but contended in a highly colorable brief unsupported by the record that Petitioner could have been convicted of second degree murder (A. 4). The District Court of Appeal accepted this argument and affirmed Petitioner's conviction.

How Federal Question Is Presented. Upon receiving the opinion of the Court of Appeal affirming conviction for the reasons stated above, Petitioner filed his petition for rehearing with that court, alleging that affirmance of conviction in such a manner or by such a rationale deprived him of the benefit of trial by jury and in effect denied him trial by jury (A. 8). Upon denial of his Petition for rehearing, Petitioner filed his petition for writ of certiorari with the Supreme Court of Florida, again alleging that the manner in which his conviction had been sustained by the Court of Appeal violated his federally guaranteed

right to due process of law and trial by jury (A. 9). Upon denial of writ by the Supreme Court of Florida for the reason that no direct conflict with prior decisions of the Supreme Court of Florida had been shown, Petitioner has filed his Petition for writ of Certiorari with this Court.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment to the Constitution of the United States denies the States the power to "deprive any person of life, liberty or property without due process of law." The Court looks increasingly to the Bill of Rights in resolving conflicting claims concerning the meaning of this spacious language. Many of the rights guaranteed by the first Eight Amendments have been held by this Court to be protected against State action by the due process clause of the Fourteenth Amendment — right to counsel, freedom of speech, etc. The test for determining whether the right to trial by jury extended by the Sixth Amendment with respect to federal criminal proceedings is also protected against state action by the 14th Amendment has been expressed in a variety of language, but essentially the reason for holding that such protection is afforded by the due process clause is that historically determination of guilt by jury is basic to our system of jurisprudence. The foregoing principles were just recently enunciated in *Duncan v. Louisiana*, 36 U.S. Law Week 4414 (May 21, 1968), so that the background issues raised by this petition have been decided. The principle issue raised by this petition is whether the appellate courts of the State of Florida have effectively denied petitioner his right to trial by jury of a serious offense (all degrees of homicide) by refusing to accord petitioner the benefit of a finding by jury of not guilty of second degree murder.

This Court has long considered that maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in American history and jurisprudence that any seeming curtailment of the right to trial by jury should be scrutinized with utmost care. *Dimick v. Schiedt*, 293 U.S. 474, (1935).

Infringement upon the basic right to trial by jury may take any number of forms, and appellate action has long been recognized by this Court to be one source of denial of this fundamental right. *Dimick v. Schiedt, supra.*

Here petitioner had been convicted of murder in the third degree, which is defined as homicide perpetrated without any design to effect death while engaged in the commission of any felony other than those which support murder in the first degree — arson, rape, robbery, burglary, crime against nature and kidnapping. F.S. Sec. 782.04. It was admitted on appeal that there was no evidence to support such a conviction. No other felony was being committed at the time of the homicide, and the District Court of Appeal of Florida did not even make a finding in this regard. There was some intimation on the part of the State that the killing was done while in the commission of aggravated assault, a felony under Florida law. F.S. Sec. 784.04. This contention is patently frivolous because any homicide involves basically an assault on the person of another. In any event the Supreme Court of Florida in the companion case of *Purkhiser v. State* summarily disposed of this contention in petitioner's favor, expressly finding that no other felony was being committed. (S.A. 2).

In order to affirm petitioner's conviction of third degree murder, the Florida Court of Appeal proceeded to reexamine the entire record and concluded that from *its view of the evidence*, the jury could have found petitioner guilty of second degree murder, which is defined as unpremeditated homicide by any act imminently dangerous to another and evincing a depraved mind regardless of human life.

The reason why the jury acquitted petitioner of murder in the second degree is that there is absolutely no evidence to support such a conviction. Petitioner was awakened at night in his home and prevailed upon by one James Purkhiser to accompany Purkhiser up to a migrant worker camp near Pompano Beach to insure that he had a "fair fight" with a fellow named Miguel Rivera, whose friends (some 20 in number) had earlier that evening administered a vicious beating to Purkhiser and a companion named Charles K. Smith. To accomplish this purpose, Purkhiser had collected some 15 others who were in a panel truck outside petitioner's home. There was no talk of shooting anyone. The aforementioned group was labeled "an armed unit" by the Court of Appeal. This so-called armed unit had one member a 17 year old girl who was "armed" with a baseball bat and a billy, This young woman was the star witness for the State (A. 68-124). One person, apparently Roy Griffin, had a pistol, and there was also a tire iron in the back of the truck. This is the extent of the armament of this so-called armed force. The Court's attention is called to this language because of the wilful, even violent nature of the action taken by the Florida Court of Appeal. Hyperbole has its uses in the language but there is no place for it in the dispassionate review of criminal appeals.

The Court of appeal also found that petitioner evinced a "depraved mind" by joining such a group for such an expedition. The jury did not think so, and this Court can take judicial notice that such conduct does not manifest a depraved state of mind, however ill advised and rambunctious. This petition does not involve a Boy Scout troop but it is concerned with murder, and the depravity of mind necessary to this crime cannot be predicated as has been attempted by the Florida Court of Appeal.

Petitioner could not have been found guilty of second degree murder because he was at the time of the homicide engaged in no act "imminently dangerous to another". Petitioner was not close to Purkhiser when the latter suddenly commenced shooting, had no weapon of any kind, did or said nothing to aid or abet Purkhiser in the homicide except possibly looking into a window and stating that the occupants were armed and to look out (A. 81-82). Petitioner not only had no weapon himself but did not know that Purkhiser had a weapon on his person and did not see the latter draw this weapon. Petitioner after the shooting did drive the panel truck back to the southern part of the County, but at this time it was unknown whether a crime had been committed and all these people could not do otherwise as a practical matter. Gerry Fields, the young woman already referred to, testified that someone said after petitioner got into the truck that "Yeah, we got Stidham and we have got his gun, too." (A. 78). Trial counsel let this hearsay statement into the record because he wanted to get some hearsay evidence in the record himself (A. 174), but it is still hearsay and incompetent to support a verdict or judgment. There was testimony that petitioner tried to make up an alibi, but this immaterial except to support an inference that peti-

tioner thought he was in "hot water", and certainly this was the case. (A. 133). The fact that a person has been convicted of crime and makes some statement about a funeral if he has to go back to prison is not evidence upon which a judgment can be sustained, and the manner in which this evidence was brought out in this cause was highly prejudicial (A. 165, 170, 216).

It is not surprising that the jury in this case acquitted petitioner of the charge of second degree murder. As a matter of fact, this is in conformity with the recent ruling by the Supreme Court of Florida in the companion case of *Purkhiser v. State* (S.A. 2) that the person who actually did the shooting and committed the homicide could be guilty at most of only second degree murder.

Included in the Supplemental Appendix is the material portion of the State's Brief in the District Court of Appeal. The inflammatory character of this document helps explain the decision rendered, and employment by the Appellate Court of a phrase like "a new breed of men". While there may be something new under the sun, this Court can take notice there is no new breed of men. The Court will notice the repeated employment of the term "it appears" in this argument and similar language. There is nothing in the record to support these assertions.

Practically all the testimony has been incorporated in the Appendix to this Petition, and a careful examination of this testimony will bear out petitioner's contention that there is simply no evidence to support a conviction of any degree of homicide.

Accordingly, petitioner respectfully submits that the appellate courts of Florida in affirming a conviction of third degree murder, of which there was admittedly no evidence at all, by finding evidence to support second degree, when there was no such evidence, and in denying petitioner the benefit of the jury's finding in this regard, denied to petitioner due process of law and specifically his fundamental right to trial by jury.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN M. McCANTS
Counsel for Petitioner

June ___ 1968.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for writ of certiorari has, pursuant to Rule 33 (1) of the Revised Rules of the Supreme Court of the United States, been served upon Honorable Earl Faircloth, Attorney General of Florida, Tallahassee, Florida and upon Honorable James T. Carlisle, Assistant Attorney General, P. O. Box 640, Vero Beach, Florida by mail this ____ day of June, 1968.

JOHN M. McCANTS

SUPPLEMENTAL APPENDIX

Filed for Record December 17, 1965. Clerk, Circuit Court, Broward County, Florida.

INDICTMENT

In the Circuit Court of the Seventeenth Judicial Circuit of the State of Florida, for Broward County, at the Fall Term thereof in the year of our Lord One Thousand Nine Hundred and Sixty-five to-wit: The Grand Jurors of the State of Florida, inquiring in and for the body of County of Broward upon their oaths do present that James Purkhiser, John Philemon Luke II, John Francis Henry aka Chico, Hubert Ray Stidham late of the County of Broward aforesaid in the Circuit and State aforesaid, did on the 5th day of December in the year of our Lord One Thousand Nine Hundred and Sixty-five with force and arms at and in the County of Broward aforesaid unlawfully and feloniously and from a premeditated design to effect the death of Catalina Flores, a human being, did kill and murder her, the said Catalina Flores, by shooting her with a pistol.

against the form of the statute in such case made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

Quentin V. Lang
State Attorney for the Seventeenth Judicial Circuit of the State of Florida, Prosecuting for said State

OPINION — SUPREME COURT OF FLORIDA
PURKHISER vs. STATE

DREW, J.

The appeal in this case is from a judgment of conviction entered upon a jury verdict finding defendant guilty of first degree murder without recommendation of mercy, and sentence of death imposed thereon in the Circuit Court for St. Lucie County.

Alleged procedural errors and constitutional arguments presented by appellant are in our opinion without merit. We conclude, however, from examination of the voluminous record that the court erred in presenting to the jury the issue of premeditation over defendant's motion for directed verdict on this point.

The evidence clearly sustains a charge of murder in the second degree. The homicide victim, an eleven year old girl, was shot in her home during a sudden and brief encounter between her father and the defendant, who came to the door in search of another man with whom he had quarreled earlier in the day. We think no purpose would be served by a detailed review of the preliminary events, beyond our considered conclusion that the record contains no charge or proof, direct or circumstantial, that the homicide occurred in the commission of a felony. Evidence relative to the fatal encounter, during the period of less than two minutes that defendant was at the scene, makes no reference to poor visibility or mistaken identity by the defendant, to whom all persons in the home at the time were complete strangers. Eyewitness testimony was that the fatal shots were discharged suddenly as defend-

ant turned toward a doorway to an adjacent room from which someone was moving. While the duration of intent may be quite immaterial, it is clear that under our law[1] an indispensable element of a charge of first degree murder is that the killing must result "from a premeditated design to effect the death of [a] human being." We find in this case no evidence upon which such a conclusion can lawfully be based.

The judgment of conviction and the sentence of death by electrocution is reversed and the cause is hereby remanded to the trial court to enter judgment and appropriate sentence for murder in the second degree.[2]

It is so ordered.

THOMAS, THORNAL and BARNS (Ret), JJ., concur
CALDWELL, C.J., ROBERTS and ERVIN, JJ., dissent

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[1]Sec. 782.04, F.S.:

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, shall be murder in the first degree, and shall be punishable by death."

[2] "924.34 When evidence sustains only conviction of lower offense. — In a case where the offense is divided into degrees or necessarily includes lesser offenses, and the appellate court is of the opinion that the evidence does not prove the degree or offense of which the defendant is found guilty, but does establish his guilt of some lesser degree or offense necessarily included therein, then the appellate court shall reverse the judgment of the trial court with directions to the trial court to enter judgment for such lesser degree or offense necessarily included in the charge and pass sentence accordingly, unless some other matter or thing appearing in the record makes it advisable that a new trial be had."

EXCERPT—STATE'S BRIEF—

COURT OF APPEAL

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JUDGMENT OF GUILT OF MURDER IN THE THIRD DEGREE.

Section 919.14, Florida Statutes, requires the Court to define all degrees of unlawful homicide, including manslaughter, included in the Indictment, whether factually applicable or not and to further instruct that it is in the province of the jury to determine the degree. *Wilson v. State*, (Fla. App. 1965) 171 So.2d 903. If a particular degree is charged, the verdict may be that of guilty of that degree or any lesser degree. In other words, where the commission of the crime charged is proved, the defendant is not in a position to complain of his conviction for an offense of lesser degree. Where there is evidence to sustain a verdict of murder in the second degree, a verdict of murder in the third degree will not be disturbed on the ground that the evidence is not sufficient to support a verdict of that degree of homicide, *Prevatt v. State*, (Fla. 1921) 82 Fla. 284, 89 So. 807. Even the fact that the evidence does not make out a case of murder in the third degree is no ground for the granting of a motion for a new trial, if the evidence is capable of sustaining a verdict of a higher degree, *Johnson v. State*, (Fla. 1908) 46 So. 174; *Clemmons v. State*, (Fla. 1901) (43 Fla. 200, 30 So. 699.

In the case at bar, the appellants were charged with first degree murder. *The trial court directed a verdict of not guilty as to first degree murder.* A verdict of second or third degree murder would have been proper if the evidence was sufficient to support a verdict of the higher degree. *Likewise, a verdict of third degree murder is proper if the evidence was sufficient to support a verdict of second degree murder.*

The evidence was sufficient to support a verdict of second degree murder. *Second degree murder is no more than a homicide committed without premeditation.* The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual is murder in the second degree, Section 782.04, Florida Statutes. The meaning of the words

"evincing a depraved mind regardless of human life" has been crystalized by judicial decisions. Conduct evincing a depraved mind regardless of human life is exemplified in *Storey v. State*, (Fla. 1943) 153 Fla. 185, 13 So.2d 912, where the defendant, following a traffic accident in which the deceased was involved, seized the deceased, dragged him from his seat in the truck onto the roadway where he beat him about the head and face. As the deceased was jerked feet first from his seat his head struck the running board and then the pavement of the highway. In holding that the defendant must be presumed to have intended the natural consequences of these acts, the Court upheld a conviction of second degree murder. In *Parrish v. State*, (Fla. App. 1957) 97 So.2d 356, the defendant chased the deceased, a young woman alone in a car at night in mortal

fear of her life, so that she disregarded a stop sign and drove at a high rate of speed into a through street and in so doing ran into another car and received fatal injuries. It was held that this conduct evinced *a depraved mind regardless of human life.*

If the death of a human being was a *natural and probable consequence of appellants' actions, then the evidence was sufficient to support a verdict of second degree murder.* In this connection, it must be remembered that appellants were part of a well-armed task force that went to a Puerto Rican labor camp for the express purpose of having one of their members fight one of the Puerto Ricans. This was nothing more than a homicide looking for a place to happen. It was certainly *reasonable to expect* that when this armed band reached the labor camp that the ensuing fight would not be restricted to Purkhiser and Rivera, but also that the Puerto Ricans would retaliate. *It is certainly not improbable to expect that a death would result.*

But the appellants were not content to let it stop there. Upon arrival at the house, which they thought to be Rivera's, Henry, armed with the ax, and Luke followed on Purkhiser's heels to the door of the Flores' home. Purkhiser threw open the door and pointed the gun at Navarro. He began to make inquiry of Navarro as to whether Navarro remembered him from the fight earlier that day. *The record reflects that Luke and Henry were in a position to see the gun.* They made no effort to stop Purkhiser. Nor did they abandon his cause.

Thus *it appears* that Luke and Henry knew that Purkhiser was armed with a pistol, at least from the time that the door was opened. It also *appears* that they *continued*

to aid and assist Purkhiser despite the fact that they now knew that this was no longer a fight with fists, but also that a gun was involved. While it may be true that the appellants did not intend that Purkhiser shoot anyone, the fact remains that they set out with the *intent to aid Purkhiser in a criminal act, that is, a fight with Rivera, and continued to aid him in an aggravated assault.* Appellants conspired with Purkhiser to assist Purkhiser in fighting with Rivera. *Appellants aided and abetted Purkhiser in an aggravated assault.*

Once Purkhiser drew the gun and Henry and Luke saw the gun, they could reasonably have foreseen that a death could occur.

> "This liability (liability for homicide) does not extend to every accidental result of the acts of fellow conspirators. It covers only such actions as could reasonably have been foreseen to occur or such as would probably happen in the execution of the conspiracy. Thus, *if two combined fight a third with fists, and death accidentally results from a blow inflicted by one, the other would also be answerable. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is liable.* In the latter case, the party who did not strike the blow could not reasonably have foreseen the use of a deadly weapon by his co-conspirator." 16 *Fla. Jur.*, Homicide, Sec. 29, page 373.

The above text is quoted for the purpose of showing how this case differs from the situation quoted in the text,

Here, resort to a deadly weapon was with the consent of the appellants. Here, *appellants could reasonably have foreseen the use of the deadly weapon by Purkhiser, because they knew that he had the gun, and Luke and Henry, at least, knew that he was pointing the gun into the Flores' home at Luis Navarro.* In *Myers v. State,* (Fla. 1901) 43 Fla. 500, 31 So. 275, it was held that a conspirator may be guilty of a wrong he did not specifically intend, if it was a natural result of, or happened accidentally through, some other specific or general evil purpose. So also it was held in *Coston v. State,* (Fla. 1939) 139 Fla. 250, 190 So. 520, that an unintended wrong, ensuing as a natural and probable consequence of an intent to do wrong, *derives its character from the general evil intent.* Here, the general evil • • •

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SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

CASE No. 221

HUBERT RAY STIDHAM,

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Appendix to Petition for Writ of Certiorari to the Supreme Court of Florida and Fourth District Court of Appeal, Florida.

JOHN M. McCANTS
Counsel for Petitioners
301 Blount Bldg.
Fort Lauderdale, Florida

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(CAPTION OMITTED)

Opinion filed November 14, 1967.

Consolidated appeals from the Circuit Court for St. Lucie County; James F. Minnet, Judge.

Garland Davis and J. Luther Drew of Ives & Davis, West Palm Beach, for Appellant-Luke.

Steadman S. Stahl, Jr., of Varon Stahl & Perlin, Fort Lauderdale, for Appellants-Henry and Stidham.

Earl Faircloth, Attorney General, Tallahassee, Charles W. Musgrove and James T. Carlisle, Assistant Attorneys General, Vero Beach, for appellee.

BEASLEY, THOMAS D., Associate Judge.

The appellants, together with one James Purkhiser, were indicted by a grand jury for Broward County, Florida, charging them with murder in the first degree in the killing of Catalina Flores; change of venue was granted and the cause transferred to St. Lucie County, Ninth Judicial Circuit of Florida; by an order of severance James Purkhiser was tried separately and convicted of murder in the first degree without recommendation of mercy.

The appellants were tried jointly. The court below directed a verdict of not guilty as to murder in the first degree and submitted the case to the jury on the lesser degrees of unlawful homicide, to-wit: murder in the second degree, murder in the third degree, and manslaughter and charged the jury as to each offense by following the statutory words defining each such degree of unlawful homicide.

In the course of the trial the state was allowed to question a witness as to whether or not Appellant-Stidham had made certain statements following the events involved to the effect that if he had to return to Raiford there would be some funerals or a funeral before he went; Stidham testified that he had never been in Raiford or under sentence to Raiford; his motion for mistrial because of the question by the state and the answer was denied.

The Appellants-Luke and Henry did not testify, and the prosecuting attorney in his argument made this statement:

> "Gentlemen, these are the last words that I will say. This isn't bargain day, as it has been described facetiously by counsel. What happened that night was not a lark, as has been described by other counsel. There are never going to be any brass bands for Catalina Flores Day. Just today. And she can't be here to ask Stidham, why did you take a gun up there, and she can't be here to ask the defendant Henry, why did you drive the truck up to my home and why did you bring an ax up on the porch of my home with a man that had the gun. She can't ask those questions. She will never be able to. But, this is the day that I ask the questions for her. As to the defendant Luke, why did you, a stranger, come up on the porch of my home with a man that had the gun that killed me. And as to the defendant Stidham, why did you drive the truck away? Because these are the questions that are rightfully asked of these three defendants, and I asked them that because, if there is any day

> for this child as to these three defendants, this is it. . . . The child had every right to ask why didn't you turn back, defendant Henry, why didn't you turn back? But he didn't, and that is the main road of this case. . . ."

The jury returned verdicts against each appellant of guilty of murder in the third degree, upon which each was adjudged guilty and each was sentenced to serve a term of ten years in the state prison. After denial of post-trial motions each appellant perfected his appeal to this court, with the appeals being consolidated by order of this court.

The appellants seek reversal of their convictions because of (a) the remarks made by the prosecuting attorney as set forth above as to Luke and Henry, (b) insufficiency of the evidence, and (c) insufficiency of the court's charge to the jury with reference to murder in the second degree and murder in the third degree. The Appellant-Stidham seeks reversal on the additional ground that the court below erred in denying his motion for a mistrial.

The question as to the challenged remarks by the prosecutor can be summarily disposed of. We are not unmindful of the strict application of the prohibition against comment on a defendant's failure to take the witness stand, and we have given careful consideration to the authorities cited and the summary of decisions in Singleton v. State, Fla.App.1966, 183 So.2d 245; however, we conclude that the complained of statement, as set forth above, was within the orbit of proper argument and can-

not be construed as a comment on the failure of the appellants to testify.

Appellant-Stidham's attack on the refusal of the court below to grant his motion for a mistrial can also be summarily disposed of. If allowing the prosecution to question a witness as to statements made by Stidham concerning his return to Raiford was error, which we do not hold, it was rendered harmless by Stidham's testimony that he had never been to Raiford or sentenced to serve a term there.

The other grounds upon which reversal is sought cannot be disposed of summarily or without a review of the facts testified to and which the jury had a right to believe, which we now summarize.

On December 5, 1965, Purkhiser engaged in a fight with one Miguel Rivera which did not end satisfactorily so far as Purkhiser was concerned, since apparently Rivera at the time had more cohorts in attendance; later on Purkhiser at LaBella's Bar gathered his own cohorts, including appellants, to accompany him as he sought out Rivera to continue the altercation; Purkhiser and his legions proceeded in a panel truck, with the search for Rivera gathering additional strength and armament as they progressed, and arrived at the home of Tito Flores (which they thought to be the home of Rivera) armed with a pistol, a tire iron, an axe, a baseball bat, and a billy; Purkhiser and the appellants got out of the truck, Purkhiser armed with a pistol and Henry armed with an axe; Purkhiser went to the door of the house, Stidham to a window, and Henry (with his axe) and Luke stationed themselves near Purkhiser. The door was opened by one

Navarro and after some conversation between Purkhiser and Navarro in which Navarro stated he did not know Purkhiser, Tito Flores came to the door and asked what was happening, to which Purkhiser replied "Hold it" and fired the gun twice, hitting Catalina Flores, an 11-year-old girl, from which wound or wounds she died.

As in all cases, the testimony was in conflict, but the jury is charged with reconciling the conflicts, and the foregoing summation covers facts which the jury were entitled to believe.

If the evidence was sufficient to have sustained a conviction of murder in the second degree, the appellants cannot be heard to complain because they were convicted of a lesser degree of unlawful homicide, even though there is no evidence to support such lesser degree (Prevatt v. State, 1921, 82 Fla. 284; 89 So. 807; Johnson v. State, 1908, 55 Fla. 41, 46 So. 174; Clemmons v. State, 1901, 43 Fla. 200, 30 So. 699; Parrish v. State, Fla.App.1957, 97 So.2d 356; Jimenez v. State, 1947, 158 Fla. 719, 30 So.2d 292).

It becomes necessary to determine whether or not the evidence was sufficient to sustain a conviction of murder in the second degree, which is, of course, the unlawful killing of another when perpetrated by an act imminently dangerous to another, evincing a depraved mind regardless of human life but without any premeditated design to effect the death of any particular individual. (F.S.A. §782.04.) The phrase "evincing a depraved mind regardless of human life," as used in the statute describing murder in the second degree, conveys the ordinarily understood meaning of ill will, hatred, spite and evil intent.

One can hardly conceive of an act more fraught with danger than becoming bodyguard for one whose announced intention is to engage in a fight and proceeding as a part of a mobile armed unit to a home where the armed aggressor kills a human being; this same action vividly portrays depravity of mind.

It is argued by appellants that there is no evidence that they took any action at the scene and that therefore they did not in any way aid and abet Purkhiser; aiding and abetting does not of necessity require simultaneous and affirmative action. It seems obvious that when three people accompany a fourth who had announced himself to be the aggressor in a planned attack, the aggressor being armed with a pistol, and one of the three inspects the premises through a window, and one stands with an axe near the armed agressor while the third stands by or near to the axe man, they had no other purpose than to aid and abet the fourth in an action imminently dangerous and evincing a depraved mind. These acts were sufficient for a jury to conclude that an inherent deficiency of moral sense and rectitude existed.

Since we find the evidence sufficient to sustain a conviction of murder in the second degree, and the appellants having been convicted of murder in the third degree, it is not necessary and would serve no useful purpose to consider the evidence as it relates to murder in the third degree.

The appellants have questioned the sufficiency of the charge to the jury covering the law on second degree murder and third degree murder. It is agreed that the charge of the court followed the statutory words defining

the degrees of unlawful homicide and that the appellants did not object to the charge and did not request any more detailed charge than was given.

It seems settled that where the law involved is set forth in a statute it is usual, proper and sufficient to charge the offense itself and to charge the jury in the language of such statute (16 Fla.Jur., Homicide, § 160; 41 C.J.S., Homicide, § 354); since this is the usual, sufficient and proper manner in which to charge the jury, the appellants, if they deemed the charge insufficient, should have requested additional charges and objected to the charge as given. The fact that modern society tends to bring forth a new order of young men who have little respect for either the person of others or the sanctity of home does not alter the conclusion that the charge of the court in the case sub judice, in the language of the statute, was sufficient. Cook v. State, 1903, 46 Fla. 20, 35 So. 665.

No error having been found, each of the judgments of conviction is affirmed.

WALDEN, C.J., and McCAIN, J., concur.

EXCERPT — PETITION FOR REHEARING FOURTH DISTRICT COURT OF APPEAL, FLORIDA

The appellants herein, HENRY and STIDHAM, contend they were denied equal protection of the law as guaranteed by the due process amendment of the Constitution of the United States of America and Section One of the Declaration of Rights of the State of Florida. An examination of the opinion herein shows that this

court has formed an opinion concerning the character and reputation of these accused. The opinion alluded to a new order of young men who have little respect for either the person of others or the sanctity of the home. It is respectfully suggested that by doing this, the court has based its decision upon supposed factual considerations not in evidence. It has concluded that the appellants are a "new order" and has, therefore, in its opinion, applied the law differently to this new order than they would have to other citizens.

(CAPTION OMITTED)

ORDERED that petition for rehearing filed by Appellant-JOHN PHILEMON LUKE, II, on November 29, 1967, is hereby denied; further,

ORDERED that petition for rehearing filed by Appellants-JOHN FRANCIS HENRY and HUBERT RAY STIDHAM on November 29, 1967, is hereby denied.

A TRUE COPY

STEPHANIE M. PETRULAK
CLERK

cc: Ives & Davis
Varon Stahl & Perrin
Charles W. Musgrove, Esq.

EXCERPT FROM PETITION FOR WRIT OF CERTIORARI SUPREME COURT OF FLORIDA

> We have previously discussed the question of the State's duty to delete portions of a confession which are not relevant to the crime in question but rather allude to prior criminal involvement of the Defendant.
> Hooper v. State, Fla.App.1959, 115 So.2d 769."

In quoting from the Hooper case, supra, it was said:

> " * * * we find that a reading of the record in this case is conducive to the conclusion that the defendant was tried for a series of crimes and found guilty of being a 'firebug' rather than of the specific arson with which he was charged. The reference to the additional accusations of larceny had no real connection with the charges in the instant case. The State could easily in both of the confessions have eliminated any reference to other crimes and have introduced only those portions germaine to the trial of the crime at issue."

(c) No relief was granted to the Petitioners on the question of the sufficiency of evidence to sustain a verdict of third degree murder. There was no evidence to support a conviction of the crime of third degree murder. The only question to be considered and that the District Court of Appeal of Florida, Fourth District, considered, was the sufficiency of the evidence to sustain a conviction of murder in the second degree. The lower appellate Court concluded that there was sufficient evidence to

sustain a conviction of murder in the second degree; and in its opinion of affirmance, set forth in what manner the Petitioners aided and abetted in the commission of the crime. The lower appellate Court concluded that their "acts were sufficient for a jury to conclude that an inherent deficiency of moral sense and rectitude existed."

The District Court of Appeal of Florida, Fourth District, in so affirming the conviction of the Petitioners, has denied to the Petitioners the right to a Jury trial as guaranteed to them by the Constitution of the United States and the State of Florida.

This conclusion of law as to an appellate Court's consideration of a Jury's verdict is contrary to the law as annunciated in the case of Parrish v. State, 97 So.2d 357, wherein the District Court of Appeal of Florida, First District, made the following comment:

> "The first question requiring consideration is the sufficiency of the evidence to support the verdict of the jury. It is not the function of an appellate court to re-try the case or to substitute its judgment for that of the jury. But if the evidence is wholly insufficient to justify a verdict of guilt, or if the facts established by the evidence do not constitute the offense of which the defendant stands convicted it is the duty of the appellate court to so declare and to reverse a judgment of guilt based upon such verdict. In performing this function the appellate court in order to give the proper weight to a jury verdict approved by the trial court must assume that the jury believed that credible testimony

most damaging to the defendant and drew from the facts established those reasonable conclusions most unfavorable to the defendant." (Emphasis supplied.)

The lower Court, in its decision of affirmance, has acted contrary to the law as enunciated in the Parrish case, supra, in that the appellate Court has substituted its judgment and conclusions for that of the Jury. In the instant case it was for the Jury to conclude whether the Petitioners' acts were such that they aided and abetted Purkhiser in the commission of the offense; and it was the Jury's prerogative to determine if those acts were such that they amount to an inherent deficiency of moral sense and rectitude.

(CAPTION OMITTED)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied, and it is further

ORDERED that petitioner's supplementary Petition for Writ of Certiorari and supplementary brief in support thereof be and are hereby stricken.

A True Copy
TEST:
SID J. WHITE
Clerk Supreme Court.
cc: Honorable B. Kemp Haskell
Honorable Steadman S. Stahl, Jr.
Honorable Roger Poitras
Honorable Charles W. Musgrove

A No, sir.

Q Did he have anything to do with an argument or fight or anything?

A No, sir.

MR. IVES: I think that is all.

BY MR. STAHL:

Q Did you see Ray Stidham or John Henry there that day?

A No, sir.

Q Did they have anything to do with the fight or the argument that you know of?

A No, sir.

MR. STAHL: That is all.

MR. GLICKSTEIN: May the witness be excused?

THE COURT: The witness is excused.

(Witness withdrew)

MR. GLICKSTEIN: Miguel Rivera.
AND THEREUPON,

MIGUEL RIVERA,

called as a witness on behalf of the State, being first duly sworn, testified as follows:

THE COURT: Will we need the interpreter?

MR. GLICKSTEIN: I don't believe so, your Honor.

DIRECT EXAMINATION

BY MR. GLICKSTEIN:

Q State your name, please?
A Miguel Rivera.

Q Where do you live?
A Puerto Rico.

Q Where in Puerto Rico?
A Anasco.

Q What part of Puerto Rico is that?
A That is east Puerto Rico.

Q How long have you been living there?
A Six months.

Q Are you married?
A Yes, sir.

Q Do you have children?
A Two.

Q How old are your children?
A One nine and one ten.

Q How long have you been married?
A Eleven years.

Q Eleven years.

Q Are you from Puerto Rico originally?
A Yes, sir.

Q When did you first come to the United States?
A 1953.

Q What did you do when you came here?
A Worked on the farm.

Q Did you come —
A When I first come.

Q What state did you come to originally?
A New Jersey.

Q When did you first come to Broward County, Florida?
A 1954.

Q What did you do when you arrived in Broward County, what kind of work?
A I went to work in a farm.

Q How long did you do that?
A About five months.

Q After that, what did you do?
A Then I went to work in a state farm market in Pompano Beach.

Q Did you then make your home in Pompano Beach?
A Yes, sir.

Q Where was that home?
A Pompano project.

Q That is the labor project?
A Labor project, yes.

Q West of Pompano?
A Yes, sir.

Q How long did you live in that project?
A Since 1954.

Q When you came to Broward County in 1954, did you have a wife?
A No, sir; I got married there.

Q You got married?
A I got married in '55.

Q About a year after you got here?
A Yes, sir.

Q Then you and your wife subsequently had two children?
A Yes, sir.

Q Now, you say you went to work at the state farmers market and how long did you continue to work at the state farmers market?

A I have been working there since then, 1954.

Q Have you worked for just one or two people at the farmers market?

A Two people.

Q Who are they?

A One was John B. Johnson and — I forget the other name. Grady Singleton.

Q Singleton?

A Yes, sir.

Q On December 5, 1965, who were you working for?

A I was working for John B. Johnson and — you know, I used to work for him during the week and during the weekend I used to do some peddling, go around the camp and sell stuff, you know.

Q How long had you been working for Mr. Johnson on December 5, 1965?

A How long?

Q Yes.

A Nine years.

Q What kind of work were you doing for him?

A Packing produce.

Q How many months of the year would you work for him?

A The season; about six months.

Q And then?
A In the season.

Q What did you do the rest of the year?
A Then, some years I stay and work in Florida and rest around and I go to the north.

Q And now you say on the weekends you had another job?
A Yes.

Q What was that?
A Peddler.

Q Peddling?
A Yes.

Q What would you peddle?
A Watches, guns, stuff like that.

Q To whom would you peddle it?
A To the boys who lives in the camp.

Q Now, on Sunday, December 5, 1965, did you take your ware around these camps?
A Yes, sir.

Q Peddling?
A Yes, sir.

Q Where were these camps located, most of them?
A On State Road 7, they call it.

Q On your way back from peddling, about how much money did you have on you?

A About $800.

Q What if anything happened to you at Margate?

A A man — there was two men on motorcycles. One got on the side of me and he asked me in — at a red light, I was waiting for the light, you know —

MR. STAHL: Just a minute. I object to what the men said to him out of the presence of my client.

MR. GLICKSTEIN: Le me first ask the witness this before you make your objection.

Q I hand you State's Exhibit 1. Do you recognize this man?

A Yes, sir. That is the man grabbed me by the chest and strike me here in the back in the head.

Q Was that at Margate?

A Yes, sir.

Q Margate is a little town just west of Pompano, is that right?

A Yes, sir.

Q What did you do after this happened?

A Then I go off, you know, and I went to Pompano. Then, at the other red light, I make a stop, you know.

Q Would that be —

A The light was red.

Q Would that be at Powerline Road?

A Powerline Road, yes sir. Then he say, "You are dead now, you are dead."

MR. STAHL: Just a minute, I make a motion that be stricken and the jury instructed to disregard it and he be instructed not to testify as to hearsay.

THE COURT: Gentlemen of the jury, disregard that statement. Mr. Interpreter, would you tell him to answer only the questions and not to volunteer any statement?

(The interpreter spoke to the witness.)

Q Now, at that time, you were on Hammondsville Road, is that correct?

A Yes, sir.

Q Traveling east? Going east, is that right?

A Yes.

Q Were you afraid?

A Yes; I still afraid.

Q Where did you go?

A I went to the store.

Q Where was the store?

A That is across from the labor camp.

Q Alson on Hammondsville Road?

A Yes, sir.

Q Now, when you got there to the store, what happened? If you can tell us what happened, without telling

us any of the conversation that took place, just tell us what you did and what this man did—

A Well, I went to the store.

Q —Purkhiser.

A I got out of the car and this man follow me, you know.

Q All right, now. That is the same man that you have indicated on State's Exhibit 1?

A Yes, sir.

Q Who has been identified as James Purkhiser. You say he followed you?

A Yes, sir.

Q What was he operating, what kind of vehicle?

A Motorcycle.

Q What kind of vehicle were you in?

A A '64 Chevy.

Q Was that your car?

A Yes, sir.

Q Go ahead then, what happened at the store?

A Then he get off — I run into the store, you know. He say, "Come here, come here, I am going to get you."

MR. STAHL: Your Honor, I would like for you to instruct him, please, in regard to the hearsay?

MR. GLICKSTEIN: Listen to the Judge, Mr. Rivera.

THE COURT: Mr. Rivera, please answer the question, don't tell us what he said. You understand? You can tell us what action took place, but you are not to tell —

THE WITNESS: Got no other way to explain it.

MR. GLICKSTEIN: Do the best you can, but do what the Judge tells you, all right?

THE WITNESS: Yes.

THE COURT: Continue.

Q Now, what did you do at the store, insofar as Purkhiser is concerned?

(Witness confers with the interpreter.)

A I entered the store and then that is when the man would call me to fight with me. Then I said to the man to go away, that I did not want to fight with him. I had not done anything to him, why should he continue to molest me. Then the police arrived — first, we grabbed each other, then the police arrived and told them to leave.

Q Were you afraid then?
A Yes, sir.

Q Did you have a weapon?
A Yes, sir.

Q What kind?
A I had a gun.

Q What kind of gun?
A Thirty-two.

Q Did you show that weapon?
A Yes, I show it. He say, "Shoot, shoot, you coward, shoot." I say, "I don't want to shoot you, go, go."

Q Why did you show the weapon?
A I figure maybe if I show the weapon, he go, you know, they go. I make them scared and they go, but he wouldn't do it.

Q Did you fight with that man, Purkhiser?
A Yes.

Q What happened to you?
A (No response.)

Q What happened to you in the fight?
A (Through interpreter) They hit me. They struck me, hit me several times.

Q Had you ever seen that man before?
A No, sir.

Q What did you do after the fight?
A I went home.

Q What did he do?
A He went away.

Q Did he speak to you before he left?
A Yes, sir. He say—

Q Don't tell us what he said.

MR. STAHL: Just a minute, I object.

THE COURT: Objection sustained.

BY MR. GLICKSTEIN:

Q How did he leave?
A On the motorcycle.

Q Were you afraid after he left?
A Yes.

Q What did you do?
A Well, I went home. I went home. Then, I went to another place, you know, to see a girl that had died from having a baby, you know.

Q You mean you went to a funeral, somebody's funeral?
A Yes, sir. Then when I was there, the friend of mine —

MR. STAHL: Just a minute, there is no question.

Q That is not responsive to my question. How soon after December 5, 1965 did you return to Puerto Rico?
A It was about three days after that happened.

Q What about your job?
A I couldn't stay; I was so afraid.

MR. STAHL: Just a minute. Your Honor, the reason he went to Puerto Rico isn't material here. It has nothing to do —

MR. GLICKSTEIN: I think anything that indicates the credibility of the witness is material.

MR. STAHL: That doesn't go to his credibility, as to why he left the country.

THE COURT: Objection sustained.

MR. GLICKSTEIN: No further questions.

CROSS EXAMINATION

BY MR. IVES:

Q Mr. Rivera, I just have one question.

MR. IVES: Mr. Luke, would you stand up?
(Defendant Luke stood.)

Q (Continued) Did you see this man that day?
A Not that day.

Q Did he have anything to do with you at all that day?
A No, sir.

Q He wasn't with Mr. Purkhiser?
A No.

MR. IVES: All right.

BY MR. STAHL:

Q Mr. Rivera, did you see Hubert Ray Stidham that day?

(Defendant Stidham stood.)

A I don't remember that I see him.

Q Did he have anything to do with this fight involving you?

A I don't think so.

Q Did you see John Henry that day?

(Defendant Henry stood.)

A No, sir.

Q Did he have anything to do with that fight involving you?

A No, sir.

MR. STAHL That is all.

MR. GLICKSTEIN: May the witness be excused?

THE COURT: The witness is excused.

(Witness withdrew.)

MR. GLICKSTEIN: Luis Navarro.

AND THEREUPON,

LUIS NAVARRO,

called as a witness on behalf of the State, being first duly sworn, testified through the interpreter as follows:

DIRECT EXAMINATION

BY MR. GLICKSTEIN:

Q What is your name?
A My name is Luis Antonio Navarro.

Q Where do you live?
A I live in Woodstown, New Jersey.

Q How many months of the year do you live up in New Jersey, Mr. Navarro?
A A couple of months, five or six months.

Q Where do you live the rest of the time?
A We come back to Florida.

Q When you come back to Florida, where do you come?
A To Pompano Beach farm labor camp.

Q What kind of job do you have when you are here in Florida?
A Drive a truck.

Q What kind of truck?
A Big truck.

Q What kind of work is it?

A Well, I don't work on the farm, but I do bring the tomatoes to the packing house.

Q Now, calling your attention to the night of December 5, 1965 —

A Yes.

Q — between ten and ten-thirty on that night, do you recall where you were?

A Yes, sir.

Q Where were you at that time?

A Well, at that time I worked at Cheston Landscaping.

Q You mean in December — He didn't understand my question. In December of 1965, who were you working for?

A I worked to Cheston Landscaping.

Q On that Sunday night, December 5, 1965, between ten and ten-thirty that night, where were you?

A I was in Tito Flores' house.

Q Where was that home located?

A In the Pompano Beach farm labor camp.

Q Who was in the home at that time?

A Well, at that time there was Angel Luis, Rosa Soto, Tito Flores, and myself and a little girl, Catalina Flores.

Q When you say Rosa Soto, is that Mrs. Flores?
A That is Mrs. Flores.

Q And you say Catalina Flores was also in the home?
A Yes, sir.

Q Now, do you know what I mean when I say living room of a house?
A Yes, sir.

Q Was there a television set in the living room?
A Yes, sir.

Q Now, who was in the living room at that time?
A In the living room there was myself, Catalina Flores, Luis Angel, Tito Flores.

Q What were you all doing?
A I be watching TV.

Q Did you see any North Americans in the Flores home at that time?
A Yes, sir.

Q Now, do you see any of them in the courtroom now?
A Yes, sir.

Q Would you point them out, please?
A That man over there (indicating).

MR. STAHL: Let the record indicate he has identified John Henry.

Q Do you recognize any of the others?

A Well, there is one here at the present time looks different. I have to see the photos compared to what he looked that night.

Q All right, which one is that?

A That man over there (indicating). This man.

Q The one on this side?

A Yes.

MR. GLICKSTEIN: Let the record reflect the witness has indicated John Philemon Luke, II. Would you mark this for identification?

(Whereupon, a photograph was marked State's Exhibit 2 for identification.)

Q I hand you herewith State's Exhibit 27 for identification and ask if you recognize the person shown there?

A Yes, sir.

MR. GLICKSTEIN: Did the jury hear his answer?

(No response.)

Q Now, does the photograph — looking at the photograph and looking at these men who are here, does that photograph help you in recognizing any of the North Americans who were there?

A Yes, sir.

Q Do you see him now in the courtroom?

A Yes, sir.

Q Point him out?
A (Witness indicating.)

MR. GLICKSTEIN: Let the record reflect the witness has identified the defendant, John Philemon Luke, II.

Q Now, let me ask you this. As to that defendant, Luke, does that photograph indicate how he looked? Is that how his hair looked at that time?
A Yes, sir.

Q When you saw him at the house?
A Yes, sir.

MR. GLICKSTEIN: The State offers State's Exhibit 27 for identification into evidence.

MR. IVES: We are going to object to it, your Honor, on the basis, first, that there has been no corpus delicti established for the introduction of this photograph, and until such time as it has been established, the criminal agency of this particular defendant, this is immaterial, irrelevant and incompetent, and, furthermore, it stands in the same relation as an involuntary statement and it was taken, as I understand it, while he was under arrest.

MR. GLICKSTEIN: If it please the Court, if any evidence that assists in the identity of the defendants or of the deceased, the rule of law in this State, as I understand it, is that it should be submitted to the jury, particularly if it is indicated, as it is indicated in this case, as shown from the witness' testimony, by his use of the photograph.

THE COURT: Let me just retrace this. Mr. Interpreter, ask this question, number one, does he recognize this man in this picture. Now, I want you to go over it very carefully and make it certain we are talking about the same man. The first question, do you recognize that man?

THE WITNESS: Yes, sir.

THE COURT: The second question, where did you first see him?

THE WITNESS: The first time that they came to the house of Tito Flores.

THE COURT: Who was with him at the time he first saw him, ask him that.

THE WITNESS: There were several others.

THE COURT: On what day or night was this?

THE WITNESS: The 5th of December, 1965.

THE COURT: Do you remember or recall from the other photograph the man identified as James Purkhiser, whether James Purkhiser was with this man?

THE WITNESS: Yes, sir.

MR. GLICKSTEIN: I am showing the witness State's Exhibit 1.

THE COURT: Do you recognize in the courtroom

the man who is in this photograph and the man in this courtroom and are they one and the same?

THE WITNESS: Yes, sir, the same.

THE COURT: Counsel, with that you may proceed to whatever position you now want to take, so I may hear you.

MR. IVES: I feel, if your Honor please, that the photograph in itself is of no value, if he has identified the man.

MR. GLICKSTEIN: If it please the Court, identity being a question of fact for the jury, the law as I understand it, is that any evidence that will assist the jury in reaching its conclusion as to identity should be submitted to them as being material, especially in view of the examination that your Honor has made of this witness now, added to the examination that the State made.

THE COURT: For the purpose the Court is only trying to make certain we are talking about one and the same person. You have photographs and the objection interrupted the interrogation and the identification. Objection overruled. The picture will be admitted into evidence.

(Whereupon, State's Exhibit 27 for identification was received in evidence as State's Exhibit 27.)

BY MR. GLICKSTEIN:

Q Mr. Navarro, what were you doing when these

North Americans came to the scene, to the Flores' home?

A Are you asking to explain what I was doing?

Q No. Were you watching television?

A Yes, sir.

Q Where were you standing when you were watching television?

A I was standing by the main door.

Q Now, I hand you State's Exhibit 4. Do you recognize that as being the Flores' home?

A Yes, sir.

Q You recognize that door?

A Yes, sir.

Q Leading to the outside of the house?

A Yes, sir.

Q Is that the door that you were standing near?

A Yes, sir.

Q Now, while you were standing there watching television, tell us what happened?

MR. STAHL: Your Honor, I would like to object on behalf of my client Stidham as to any conversation. I don't raise that objection as to my client Henry, and would like to ask you to instruct the jury in regard to such.

THE COURT: At this point, I think he hasn't asked about any statements. He just said what happened.

MR. STAHL: Well, when he starts talking about what happened and it is going to include statements and I don't object to these statements as it pertains to Henry because he was there.

THE COURT: Gentlemen of the jury, as counsel has told you, we have three defendants, and certain facts and circumstances may apply to one and not apply to the other. That will be your duty, of course, to separate and segregate those facts that apply to one and don't apply to the other, and you are not to intermingle one and give more weight that would operate against any one of these defendants. When this testimony comes up, you are not to regard it except as it affects each individual defendant. Continue. Any time counsel has an objection and feels it might escape the Court or the jury, you will raise it and we will go through this explanation again.

BY MR. GLICKSTEIN:

Q Tell us what happened.

A On the night of December 5th, I was at the home of Mr. Tito Flores, standing by the main door, looking at television, which was on a corner. Then, I had my left hand on the door, looking at the television, and at that moment, suddenly the door was opened and when I looked, like this, to see who it was, I was put at pistol point and the man said whether I remembered him, whether I remembered what had happened on the motorcycle. My answer was that I did not know him. Then he asked me if I remembered what had happened at the store. Then, at that moment, Mr. Tito Flores exited, came out, and asked me in Spanish what was happening, what was wrong. When Mr. Tito asked me, the man that had me at pistol

point changed the position of the pistol and said, "Hold it." At the same time that he said, "Hold it", he fired. He fired twice. Then, one of the bullets caught the little girl that was on the chair. That was all that had happened.

Q The little girl was Catalina Flores?
A Yes, sir.

Q Now, who was the man that shot the little girl?
A Purkhiser.

Q Is that the man that you see in State's Exhibit 1?
A Yes, sir.

Q Now, when he shot her, where was this man that you have identified on the far side, who is the defendant, John Francis Henry? The man in the checkered coat?
A Standing behind him.

Q What did the defendant Henry have in his hands, if anything?

MR. STAHL: I object to that because the allegations in the indictment are that the girl, Catalina Flores, died of a gunshot wound and, unless my client had a pistol in his hand, it would be irrelevant and immaterial.

THE COURT: Objection overruled.

Q What did the defendant Henry have in his hands?
A A big ax.

Q How did he have it in his hands?
A Like this (indicating).

Q Stand up and show the jury how he had it?
A In this position (indicating).

Q Indicating in front of him and up in front.

THE COURT: Don't tell him; the jury is here and they can see it.

MR. GLICKSTEIN: If it please the Court, the reason I did it was not because of that, but to let the record reflect it.

THE COURT: Continue with your examination.

Q Now, where, when Purkhiser shot the little girl, where was the defendant Luke, the man seated here to the right?
A He was behind him, but about a foot to the side.

Q A foot to the side of Purkhiser?
A The one that had the ax.

Q And who was Luke standing behind?
A Behind the one that had the ax.

Q Where was Tito coming from when Purkhiser fired the two shots?
A When he heard me talking, he was coming from the dormatory room where I was.

Q Coming from the bedroom, into the living room?
A Yes, sir.

Q And how close was the little girl to Tito?
A About four and a half.

Q And when Purkhiser — First of all, when Purkhiser had the pistol on you, how close did he have the pistol to you?

A Very closely put. Right here, along the waistline.

Q Could you actually feel the pistol?

A No. No.

Q But he had it within a few inches of your body?

A Inches.

Q Now, you stated that the little girl had been seated in a chair. What did the little girl do when all this excitement took place?

A The little girl ran towards the bedroom at the moment of the firing. She tried to run to the room. One of the bullets reached her.

Q She jumped up from the chair?

A I do not know what maneuver she made. When he had me at that pistol point, I jumped back and that is when he fired and I do not know what maneuver the little girl did.

Q Then, after the little girl had been shot with the pistol by Purkhiser, where did she go?

A To the bedroom, in a bed.

Q And did you see her in the bed?

A Yes, sir.

Q This was Catalina Flores?

A Yes, sir.

Q Then what did you do with Catalina?

A I took her in my arms, put her in the car in the back seat. Then I took her to the hospital.

Q That is the North District Hospital?

A Yes, sir. When we arrived there, the nurse told me — examined her and said she was dead.

Q And when Purkhiser shot the little girl, he was standing in the doorway to the Flores home?

A Right in the same part of the entrance.

Q The same door that he had been — that you had been leaning on while watching television?

A Yes, sir.

Q Had you ever seen any of these North Americans before in your life, Luis?

A Before that, I had never seen them.

Q When you were in the Flores home that night, did you have any pistol or any kind of weapon?

A No, sir.

Q Did Tito Flores, the father of Catalina, have any weapons?

A That I know of, he did not have any.

Q Did you see any gun in the hand of any of the Puerto Ricans that were in the house?

A The Puerto Ricans that were living there at the time, no one had anything; only Purkhiser, who had done the firing.

Q That was the only gun that you saw in the house?
A Yes, sir.

Q Do you know the caliber pistol it was that Purkhiser shot Catalina Flores with?
A I know it was a .38, because the next day I saw the cartridges and the number was on the bullet. It had the number of the bullet.

Q Now, when you picked up Catalina from the bed to take her to your car, did you go out of that same doorway that Purkhiser had shot her from?
A Yes, sir.

Q Had the North Americans gone?
A They had left. As soon as they had fired, shortly thereafter, they left.

Q Did you take Catalina in your own car to the hospital?
A No. In the car belonging to Tito Flores. At that time, I did not have any car.

Q Before the little girl — before the shots that were fired by Purkhiser — before the shots fired by Purkhiser — did you hear or see any other shots?
A No, sir. Just at the moment that he fired.

Q Now, before the shots fired by Purkhiser into the Flores home, had you ever seen any bullet holes in the Flores home?
A No, sir.

Q After Purkhiser had shot Catalina, did you see bullet holes in the Flores home?

A Yes, sir.

Q Where?

A One in the wall and another in the door that is leading onto the bedroom.

Q That is the door through which Tito was coming when he asked you what is happening?

A Yes, sir.

Q And the wall is the wall where the phonograph was?

A Yes, sir.

Q After you had taken Catalina to the hospital, later that same night, did you have occasion to see any of these defendants again?

A The same night, I saw one of them at the courthouse in Fort Lauderdale in the lineup room.

Q Which one of these defendants did you see?

A (Indicating) The first — this was the first one I saw.

MR. GLICKSTEIN: Let the record reflect that the witness has pointed out the defendant Luke.

Q After that first lineup, did you see the defendants again?

A Two nights later, I saw them again, the same courthouse.

Q Which ones did you see two nights later?
A I saw this one (indicating).

Q The defendant Henry?
A And Purkhiser.

Q And the defendant Purkhiser?
A Yes.

Q Did you also see the defendant Luke again?
A Yes, sir. The same night they had the lineup again.

Q All three were in the same lineup?
A Yes.

MR. GLICKSTEIN: If it please the Court, could I ask the jury to be excused for a moment?

THE COURT: All right, excuse the jury.

(Whereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury:)

THE COURT: What is it?

MR. GLICKSTEIN: In accordance with the Court's instructions that the jury not be present when a witness is asked with respect to the ax, I would like the Bailiff to ask Mr. Heim to come in and bring the ax with him.

THE COURT: All right.

MR. STAHL: Your honor, could we go into this phase of the case after lunch? I think Mr. Ives would

* * *

MR. IVES: Yes, sir, it is.

MR. STAHL: Yes, it is.

THE COURT: When the jury returns, you may bring that to their attention in the same form as you did before. Now, we will proceed with Mr. Navarro. I think this should be in Spanish, so there is no question about this man understanding the full import of all these questions.

MR. GLICKSTEIN: I would like this marked for identification.

(Whereupon, an ax was marked State's Exhibit 28 for identification.)

AND THEREUPON,

LUIS NAVARRO,

the witness on the witness stand at the noon recess, resumed the witness stand and testified further through the interpreter as follows:

DIRECT EXAMINATION (Continued)

BY MR. GLICKSTEIN:

Q. Mr. Navarro, let me remind you that you are still under oath.

A Yes, sir.

Q I hand you herewith State's Exhibit 28 for identification and ask if you can identify it?

A That is the ax that he had that night.

Q Who had it; what night?

A That man (indicating).

MR. STAHL: Let the record reflect he pointed to John Henry. May I inquire?

MR. GLICKSTEIN: Yes, sir.

BY MR. STAHL:

Q Mr. Navarro, what is it about this ax that you can identify as being the ax that John Henry, that man (indicating) had?

A He was the only one that had that ax at the time.

Q Do you know that this is the particular ax that he had?

A Yes, sir, that is the one.

Q How can you identify it as being the one?

A Because that was the only one that was there at the scene at the time.

Q How do you know this is the particular ax that he had?

A Because I know it; I recognize it.

Q What distinguishes that ax from some other ax?

A What axes are you referring to?

Q Any other ax.
A That is the only ax that I saw.

Q Is there something particular on this ax that you can identify as being the ax you saw?
A It is the same one; it has the same things on it.

Q How far away were you when you saw this ax?
A About two and a half to three feet.

* * *

the jury, testified further through the interpreter as follows:)

DIRECT EXAMINATION (Continued)

BY MR. GLICKSTEIN:

Q Mr. Navarro, I hand you herewith State's Exhibit 28, which has been filed in evidence, and ask you if you recognize this, please?
A Yes, sir.

Q Where did you see that ax on the night of December 5, 1965?
A When some Americans came to the porch of the home of Mr. Tito Flores.

Q All right, sir. And now, will you state which of these Americans — which of these North Americans had that ax which is Exhibit 28 in their hands or in his hand?
A The one that is over there (indicating).

Q In the checkered coat?
A Yes, sir.

MR. GLICKSTEIN: Let the record reflect that the witness has identified the defendant Henry.

Q How far was that defendant from you with this ax in his hands?
A From two to three feet from me to where he was standing.

Q Now, how can you identify that ax? How do you recognize it?
A Because, from where I was standing (illustrating), it was quite close and he held it in this position. He had it like this.

MR. GLICKSTEIN: No further questions.

CROSS EXAMINATION

BY MR. IVES:

Q Mr. Navarro, are you a good friend of Mr. Tito Flores?
A Yes, sir.

Q You were visiting there in his home the evening of December 5th, is that right?
A Yes, sir.

Q You were watching television?
A Yes, sir.

Q Now, then, enlighten the jury then, describe the room in which you were watching the television in?

A I was in the living room where the television was, at the main entrance, the main door. I was looking at the television that was on this side in the corner (indicating). I had my left hand on the door, the screen door. Then, as I was looking that way, suddenly the door was lurched open. Then, when I looked this way, they had me at gun point. The man that had me at gun point asked me whether I remembered him, whether I remembered what had happened —

MR. IVES: Your Honor, we object at this point; it is not responsive to the question.

THE COURT: Objection sustained.

MR. IVES: I merely asked him to describe the interior of the house.

Q Now, Mr. Navarro, will you tell us if there were any lights on in the living room?

A Yes, sir.

Q How many?

A One bulb.

Q Was that a strong light or a dim light?

A It was a hundred watt bulb, I believe.

Q You always leave the large light on when you are watching television?

A Yes, sir.

Q All right, sir. Now, that 100 watt light is the only light that was on in the room?

A The one of the porch, or balcony, was lit, but when they arrived, they opened the door, they tangled the extension cord and the light outside went out.

Q All right, sir, that is fine. Now then, in other words, when somebody opened this front door, it tangled the extension cord that went to the light on the porch and the light on the porch went out?

A Yes, sir.

Q All right. Now, then, at the time that the door was opened and the light went out, you didn't know how many people were there at the door, did you?

A I saw three persons.

Q Did you see three persons before the light went out?

A When the light went out, I turned around and they had me at gunpoint, is when I saw them.

Q In other words, you were not aware that anybody was on the porch until the door was suddenly pulled open?

A Yes, sir.

Q In other words, you were facing the TV, weren't you? You were looking at the TV?

A Yes, sir.

Q You had your back turned to the porch?

A Yes, sir. I was standing like this (indicating).

Q So, then, by the time that you turned around and somebody put a gun in your side, the light was out on the porch?

A Yes. I had my hand on the door when they pulled my hand with the motion of the door being opened and I looked back, was when I was put at gunpoint.

Q Now, sir, I want you to tell the jury which hand did you have on the door?

A The left hand.

Q The left hand. Now, Mr. Navarro, is that the door in front of which you were standing?

A Yes, sir.

Q All right. Now, then, I want you to point out—come over here, please, sir?

(Witness and interpreter went to jury box.)

Q I want you to stand here and I want you to point out to this jury which side of that door you were standing on?

A I was standing here with the left hand on here, looking at the television that was here.

Q In other words, you were standing on the side of the door that is not shown completely in this picture?

A Yes. This door was there at the time. This is the door that they opened.

Q Now, is there another door here?

A The main door.

Q The main door? Was that screen or wood?
A Wood. This is the screen door.

MR. IVES: Can you gentlemen see that back there, where his hand was?

Q Show the jury now. You were standing on the side that is not shown in this picture? Which hand did you have on the door?
A I was standing with my hand this way.

Q You haven't told me which hand, left or right.
A The left one.

Q The left hand. Now, were you holding onto the door, or was your hand just against the door?
A It was on.

Q On the door?
A On the door.

Q Were you holding onto the door?
A No.

Q Now, then, when someone opened the door, I believe you testified just now that it pulled your hand out?
A Yes, sir. They opened it so strongly, so quickly, that when I did like this, the hand went along.

Q Now, that door opens out, is that correct?
A Yes, sir, out.

Q Not into the room?
A No.

Q All right, you can go back and have a seat.
(Witness resumed witness stand.)

MR. IVES: Does everybody understand that from this picture? (Asked of jury)

Q Now, then, at the time this door opened, how wide did it open?

A They opened it—whoever opened it, at the same motion of opening the door, he positioned himself inwardly more than outside of the door.

Q Did you see who opened the door?

A Yes, sir.

Q Who opened the door?

A The fellow that fired.

Q The fellow that fired? All right. Now, then, did the fellow that fired come into the room entirely, or was he still on the porch or was he on the threshold?

A He stood by the door and he fired from the door.

Q All right. Now, then, I want to know if the one that fired the gun was the only one that came just inside the door?

A He was the first one and the others were behind him.

Q Let me ask you this then. The man that fired the gun, when he got on the threshold, did he ever put his foot inside of the living room?

A (Demonstrating) No. He remained like this and from there was where he fired from.

Q All right. Now, then, going back to the picture—would you come over here, please?

(Witness and interpreter went to jury box.)

Q Now, then, when you say that the person that fired the pistol got just inside of the door, was the door to his back?

A Yes. When he opened it and stood like this (indicating), then the others were behind him.

Q All right. Now, then, let me ask you this. When the man that fired the pistol opened the door and stepped onto the threshold, did he have either hand on the door?

A No. He put his foot against it; he held it with the foot.

Q All right, then, would you show the jury then how wide this door was opened when the man that fired the gun was standing in the doorway?

A (Indicating) He opened the door and had stepped in this way and I do not know how wide he had opened that door. I know that he was like that. Like this. I do not know how wide he opened it.

Q All right. Tell us then, when he stepped in the door, you said he didn't have either hand on the door, did he?

A No. He had it held with his foot and the pistol pointing.

Q Which hand did he have the pistol in?

A The right.

Q What was the left hand doing?
A He had it like this on the side.

Q And he had the pistol in the right hand, is that right?
A But he had it here, put on me.

Q He had it here, put on you? Which side?
A My stomach. When he was like this and I went like this, I was put at gunpoint right to the stomach.

Q All right. Now, then, you can go back and have a seat.

(Witness resumes witness stand.)

Q Now, then, at the time that he put the gun on you and his left hand was down by his side, was the door against his back?
A It was to his side, because the door opens this way, to the side.

Q All right. Now, then, was the man that had the pistol the only one actually inside of the door?
A That was the one that came in the forward position of the main door and the others were behind him.

Q All right. Now, then, were the other people that came up on the porch, you say behind the man that had the pistol?
A Yes, sir.

Q None of the people that came up on the porch ever got inside of the house?
A No, sir; they remained at the porch area.

Q All right. Mr. Navarro, I show you State's Exhibit 2. Would you tell us, or come over here and show the jury, what porch you say now that these people were on?

(Witness and interpreter went to jury box.)

A Here (indicating).

Q That was the porch?

A Yes.

Q Do you know how big that porch is? How many feet by how many feet?

A No, I do not know how wide.

Q Now, then, I want you to show the jury here that the person that had the gun you say had to open this door and it comes out, is that right?

A No, because it opens towards the side, towards the side.

Q Which way does this door open?

A When you pull it, it opens out this way.

Q Comes out towards the street?

A No, not to the street. This is not a door here. This is the porch. The door is in this area here of the picture.

Q Correct. Can you gentlemen see where the door is in this porch? (Asked of jury) Now, I want you to tell these jurors which way the door pulls?

A When you are coming this way (demonstrating), and you open it, it opens towards this way, towards the other wall.

Q Now, watch me. When I want to get in this door, do I pull it over against this way, or do I pull it over against this wall?

A To the wall on this side.

Q Right here?

A Towards this side.

Q All right, sir. Now, then, when the man that had the gun was right in the door, then where were the other two people, three people, or four people, however many?

A The one that opened the door was here and then the big one that had the ax about one foot from him, and the other one was a foot and a half away from the other one.

Q Now, was the door between the man that had the gun and the other people that you say you saw?

A No. When he opened the door, then he held it with his foot. The big one was behind him with the ax in position and the other one was about here.

Q All right, you can take your seat.

(Witness resumes witness stand.)

Q Now, then, at the time that you are describing all this, though, the light had gone out on the porch?

A When they pulled it, the light went out.

Q All right, sir. Now, then, Mr. Navarro, had you ever seen this gentleman prior to December 5th (indicating defendant Henry)?

A Never before.

Q Never before?
A No, sir.

Q Had you ever seen Mr. Luke here, my client?
A Before that night, never.

Q All right, sir. Now, then, you say that you saw Mr. Luke on that porch that night?
A Yes, sir.

Q How did you recognize Mr. Luke that night, if the light had gone out and you had never seen him before in your life?
A Well, because they were close, quite close to me. The light that was lit, you can see towards the outside porch. You have the advantage of seeing someone that is on the outside.

Q Now, did Mr. Luke then have on glasses?
A That day, he did not have any.

Q He didn't have any?
A (No response.)

Q Is there anything in particular why you could recognize Mr. Luke?
A Yes, sir.

Q I say how, what in particular?
A Because he had an indian type of haircut. He had a haircut sort of an indian type.

Q And he had an indian haircut?
A That is what we call it.

Q You swear under oath that that is the way you recognized him?

A I recognized him at the court, that that was the man that was there at the time.

Q You say you recognized him at the courthouse?

A Yes, sir.

Q Isn't it a fact that a deputy sheriff came and got you and told you that he had one of the men that was there at the house?

A The first night that we went to the court, that was the first one that I identified.

Q The first one?

A And then two nights later we went again; I identified the other two.

Q Wasn't he the man that the deputy told you that he had arrested?

A He was the first one that I identified; he did not tell me.

Q You haven't answered my question. I am asking you what did the deputy tell you when he took you to the courthouse?

A When we went to the lineup, he told me to be sure that of the ones that are there, it would be someone that had been at the house, and then that was the one that I identified.

Q Had he previously been questioned by the deputy?

A Yes. He made some various questions. He asked various questions.

Q Now, then, at the time the deputy talked with you, isn't it a fact that he told you that he had someone arrested that was there and he wanted you to come down and see him?

A When he called me to the lineup, come, let's go to the room, we have arrested some of them. If you can identify them, some of them, and I identified him.

Q All right. Now, then, you identified this man (indicating)?

A That was the first one.

Q As being baldheaded?

A He had all this shaved off and he had hair in the center.

Q All right. Now, then, was Mr. Henry there (indicating)? That first night?

A Not the first night, no.

Q Was Mr. Stidham there the first night? The gentleman in the middle?

A I don't remember him. I did not see him at the lineup.

Q The first night?

A No.

Q All right. Now, then, let me ask you something. Was this the only man — was this the only man the first night that was baldheaded?

A That he — yes, sir, that was the first one that I identified.

Q He was the only one then that was baldheaded the first night?

A He was not bald; his hair was cut on the sides.

Q Now, then, did you go up to him and pick him out and point to him and say this is the man?

A I indicated with my hand that that was the man.

Q Now, was there a glass between you and this man?

A Yes, sir.

Q Were you there discussing this lineup with the deputy?

A There we did not discuss anything.

Q Did the deputy tell you at that time that you were looking at this man, or whoever you were looking at, and they couldn't see you?

A Yes, sir.

Q He told you that there was invisible glass, that you could see the people, or the person or whoever it was in there, John Luke, but John Luke couldn't see you, is that right?

A Yes, sir.

Q Now, then, did he have any crutches?

A Not the first night, no.

Q Not the first night? Now, then, you have previously testified, I believe, not too long ago, that two days later you saw Mr. Luke at the courthouse?

A Yes, sir.

Q Is that right?
A Yes, sir.

Q You stand by that oath that two days after the 5th you saw Mr. Luke at the courthouse?
A Yes, sir.

Q Now, then, with respect to this ax, Mr. Navarro, did I understand you to say that this gentleman back here, Mr. Henry, had this ax in this position (indicating with ax?)
A He had it up — lifted it up a little higher than what you have it.

Q Would you please show us one more time?
A (Demonstrating) He was standing behind the other one, like this.

Q Like that? And he was behind another man?
A Yes.

Q And had the ax, holding it like this?
A Yes.

Q Was anything said by that man?
A No.

Q Did he threaten anybody with it?
A No.

Q Did he say —
A He was just standing in this way (indicating); he did not say anything.

Q Just standing there?
A He came with the ax and stood in this position.

Q All right. Now, then, Mr. Navarro, I want you to tell the jury what is so peculiar about this ax from 25 others exactly like it that you could tell there with the light off that this is the ax that that man was holding?

MR. GLICKSTEIN: If it please the Court, the testimony has been the light on the porch was off; not the other light.

MR. IVES: He testified Mr. Henry was on the porch.

THE COURT: Objection overruled. Continue.

Q Will you tell me what is so peculiar about this ax that it would stand out in your mind from 25 others exactly like it out there on a porch at night when you had never seen the ax before in your life?
A Because I was very close to him and that was the only ax that was present at the time. That is why I recognize it.

Q Let me ask this, you didn't take the ax away from Mr. Henry, did you?
A No, sir.

Q Have you at any time put your initials on this ax at the request of any deputy sheriff that told you they had recovered this ax from some place?
A No, sir.

Q So, then, there is no way in God's world that you could say that this was exactly the ax that that man had, unless you got it yourself, could you?

A This is the ax that the police took into custody and this is the one that I saw.

Q That is what we want to know. Now, how do you know that the police took this ax into custody?

A Because he presented it at the court.

Q All right, then, what you are doing then is telling what the police told you, is that right?

A No. He asked me if this was the ax and I said, yes, that was the only one that was there at the time.

Q Did you tell him that this was the ax, or this looked like the ax?

A That this was the ax.

Q Now, then, you say that you saw Mr. Luke on the porch; how near was he to the door?

A From three feet distance from where I was, he was there.

Q Three feet?

A Something like that.

Q And this was after the light was out that you noticed him?

A The porch light was out.

Q I want you to tell the jury what did he do or what did he say, if anything?

A Mr. Luke did not say anything; he just stood

there. He did not comment anything; he was just there and I did not see whether he had anything in his hand.

Q You didn't see any weapon of any kind in his hands?

A No.

Q And he said nothing?

A He did not speak anything.

Q He made no attempt or any effort to come in the house?

A No. He remained standing (demonstrating) on the porch and the other was here and the one with the ax behind and he was here, but did not comment anything.

MR. IVES: That is all I have, your Honor.

MR. STAHL: Mr. Stidham, stand up.

(Defendant Stidham stood.)

BY MR. STAHL:

Q Did you see that man out there that evening at all?

A No, sir.

Q That is Stidham. Now, John Henry—

A Yes, sir.

Q —the man with the ax—

A Yes, sir.

Q —did he threaten you or anybody else with the ax?

A No, he did not speak anything; he just held the ax like this. He did not say anything.

Q How many shots were fired by Purkhiser?

A In the house, two shots.

Q Two shots? Were they one right behind the other (snapping fingers twice)?

A Yes, one after the other (hitting railing with hand.)

Q Did the men immediately leave the porch?

A When the little — mother of the little girl started shouting, they then ran away.

Q Did you see John Henry in any way give any aid to Purkhiser in this shooting?

MR. GLICKSTEIN: I object.

THE COURT: Objection overruled.

A He did not say anything. Only Purkhiser asked me whether I knew him and whether I remembered what had happened and then was when he fired.

Q All right. Now, before Purkhiser fired the gun, did you jump back?

A No. When he had me at gunpoint, then Mr. Tito was coming towards this way, then he told him, "Hold on", he has me at gunpoint and he turns the position of the pistol and tells him, "Hold on." When he goes like

that, that is when I jumped and then that is when he fired.

Q Purkhiser didn't shoot the gun at you, did he?
A Not to me, but he had me at gunpoint.

Q Now, actually, Purkhiser took the gun off of you and fired rapidly at Tito Flores?
A He had me at gunpoint and then rapidly pointed towards Tito.

Q What did he say to Tito?
A The only thing that he said was to hold it. That was the only thing that he said to him.

Q And the little girl had jumped up and ran?
A When I was standing when he tells to Tito to hold it, I am going to fire, the little girl went —ran to the room. I do not know what maneuver she made at the time. Then, in the hollering, they left and I took her in my arms and took her to the hospital.

Q Now, John Henry, what was the closest that he came to the front door?
A He was behind the first one and he was about a foot behind the other.

Q So that would put him how many feet from the door, from the threshold?
A Must be about two and a half feet.

Q And he never moved the ax from that position?
A No. When he came in, he centered himself in

that positoin and did not move. He did not say anything; he just held it like this.

Q You didn't see any gun in John Henry's hand, did you?

A No, sir.

Q How many shots were fired that night?

A That I can tell truthfully, two inside, one outside that was fired at the car. Three that I can speak about with proof. Two inside and one outside that was near the tire area.

Q What did Tito Flores do immediately after the shooting?

A When I took the little girl in the car, I did not know what they did. Then, when I returned, the police was there, they were there.

Q Did Tito Flores run some place right immediately after the shooting?

A I do not know because when I took the little girl and I passed by the door that they had stood, they remained in the house. I do not know what maneuvers were done.

Q How long was Purkhiser standing at the door with the gun in your stomach?

A Not more than two minutes since they arrived and then, compared to when it happened, it was very quick.

Q Was John Henry and Luke standing at the door when Purkhiser fired the gun?

A No; they were behind him.

Q They were behind him?

A Behind him.

Q When Purkhiser started shooting the gun, didn't they run off the porch?

A They fled. They ran. They started running. Where they went to, I don't know. They all scattered.

Q Now, had John Henry and had Luke left the porch by the time that Tito Flores came out of the bedroom and walked towards Purkhiser?

A No. They left when the firing commenced, when the mother hysterically hollored and cried out.

Q And they ran?

A They left and then when he removed his foot from the door was when the door reclosed again, because the door had springs that when you release it, it would close.

Q And Luke and Henry did absolutely nothing to help Purkhiser with his shooting, did they?

MR. GLICKSTEIN: Same objection as made before.

THE COURT: Objection overruled.

A They did not comment anything or say anything. The only one that spoke was the one that spoke to me, was the one that had the pistol.

Q And they didn't — Luke and Henry didn't help at all, did they?

A At that moment, no.

Q At that moment? But, at any time?

A Any other occasion, I do not know.

MR. STAHL: That is all.

REDIRECT EXAMINATION

BY MR. GLICKSTEIN:

Q You say when Mrs. Flores screamed, all three of them ran away, is that correct?

A Yes, they left.

Q And the mother screamed after the shooting, is that correct?

A When the shots were fired that the little girl ran, was when she—

Q Screamed?

A Expressed herself. She started hollering.

MR. GLICKSTEIN: Thank you, no further questions.

THE COURT: Any further questions?

MR. IVES: No, sir.

MR. GLICKSTEIN: May this witness be excused?

THE COURT: The witness may be excused. Call your next witness.

(Witness withdrew.)

MR. GLICKSTEIN: Gerry Fields.
AND THEREUPON,

GERRY FIELDS,

called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GLICKSTEIN:

Q State your name, please?
A Gerry Lee Fields.

Q Your age?
A Seventeen.

Q Do you know James Purkhiser?
A Yes, sir, I do.

Q Do you know the defendant John Philemon Luke, II?
A Yes, sir, I do.

Q Would you point Mr. Luke out, please?
A Yes, sir. He is the man with the glasses, on the left.

Q Let the record reflect the witness has identified the defendant Luke. Miss Fields, do you know the defendant Hubert Ray Stidham?

A Yes, sir, I do.

Q Would you point him out, please?

A He is the man in the middle.

Q Let the record reflect that the witness has identified the defendant Hubert Ray Stidham. Do you know the defendant John Francis Henry, also known as Chico?

A Yes, sir, I do.

Q Would you please point him out?

A He is the man on the right.

Q Let the record reflect — In the checkered coat?

A Yes, sir.

Q Let the record reflect that the witness has identified the defendant John Francis Henry, also known as Chico. Did I ask you if you know James Purkhiser?

A Yes, you did.

Q And you indicated that you know him, is that correct?

A Yes, sir.

Q Did you have occasion to see the said James Purkhiser on the night of December 5, 1965?

A Yes, sir.

Q How was he dressed?

A He was wearing Levi's and a denim jacket.

Q What emblem or insignia was on the denim jacket?

A There was a red cross with white backing on the back of the jacket.

Q Now, do you recall being present at a fight involving James Purkhiser on that night?

A Yes, sir.

Q Where did it occur?

A It occurred at a store on Hammondsville Road.

Q Is that in Pompano Beach, Florida?

A Yes, sir.

Q Do you recall any one particular adversary or opponent?

A Yes, I do.

Q Was he a Puerto Rican?

A Yes, he was.

Q All right, now, following this fight, do you know where James Purkhiser went?

A Yes, sir.

Q Where did he go?

A He went to LaBella's, which is a bar in Hollywood.

Q How did he get there?

A On a motorcycle.

Q All right. Now, were you also riding on a motorcycle?

A Yes, I was.

Q With someone other than any of these three defendants?

A Yes, sir.

Q Is that correct, and someone other than Purkhiser?

A Yes, sir.

Q Now, when you got down to LaBella's, did you have occasion to see the defendant John Francis Henry?

A Yes, sir.

Q Can you describe what conversation involving Purkhiser took place in the presence of the defendant Henry?

MR. STAHL: I would like you to advise the jury this would not pertain to my client, Mr. Stidham.

MR. IVES: Also that it wouldn't pertain to my client, Mr. Luke, unless he was present.

THE COURT: Gentlemen of the jury, you have noted what both counsel have said and you should apply it. This conversation had nothing to do with the other two defendants and you should apply it only to the man who was present, John Henry.

A Would you repeat the question?

Q I asked what if anything that Purkhiser said in

the presence of the defendant Henry that you recall while you and Henry and Purkhiser were at LaBella's?

A I don't remember anything at that time that he said to Henry.

Q Do you recall what Purkhiser said to anyone at LaBella's in Henry's presence as to where he had been or what he wanted to do?

A Yes, sir. He said that he had been beaten up by about 25 Puerto Ricans and that he wanted to go back and get this Miguel Rivera and have a fair fight with him and he wanted other people to go with him to keep anyone else out of it that may interfere.

Q All right. Do you recall him asking for any phone number?

A Yes, sir.

Q What was that number of?

A He asked me the number of the Sportsman's Inn.

Q Did you observe Purkhiser making a phone call?

A Yes, sir.

Q Now, do you know where he called?

A Yes, sir, he called the Sportsman's.

Q Where were you when he made the call?

A I was standing beside him.

Q Now, do you recall what words Purkhiser used to describe the action he intended to take on his return to Pompano Beach? Did he use a particular word as to

this Puerto Rican, this particular person that he had been in a fight with?

A When he was talking on the phone, you mean?

Q Well, at any time, did he use one word to indicate what he intended to do?

A No.

Q Any particular words?

A Not one particular word, no.

Q All right. Following his phone call to the Sportsman's — Is that a bar?

A Yes, it is.

Q Following that phone call, did you have occasion to see the defendant Luke at LaBella's?

A Yes, sir.

Q All right. Do you know where Luke had been prior to his coming to LaBella's?

MR. IVES: We want to object to that, if your Honor please. That would be pure hearsay.

Q Of your own knowledge, do you know where he had been immediately prior to coming to LaBella's? Do you know?

MR. IVES: If he wasn't there, it would still be hearsay.

THE COURT: Just a moment. Read the qusetion.

(Question read.)

THE COURT: Objection overruled. If she knows.

A I am not sure.

Q What if anything do you recall Chico saying? That is the defendant John Henry, saying at LaBella's?

A I can't remember anything in particular at LaBella's.

Q What if anything do you recall the defendant Henry saying about going to Pompano Beach, or what they would do or what would be done if anything at Pompano Beach?

A At what time?

Q While at LaBella's?

A I said I didn't remember anything in particular at LaBella's.

Q Did you have occasion — Well, do you know of your own knowledge if Luke, the defendant Luke left LaBella's after his arrival there?

A (No response.)

Q Did Luke leave LaBella's after he got there?

A Yes, he did.

Q Do you know where he went?

A Yes, I do.

Q Where did he go?

A Him and myself went down to an apartment on Pierce Street where at the time there was several of us residing there, and I asked him to take me down there to get McCaffrey and Howard Geer.

Q Do you know where he went after that?
A Went back to LaBella's.

Q Did he ever go — Do you know an individual by the name of Roy Griffin?
A Yes, sir, I do.

Q Did he go to Roy Griffin's?
A He followed us, after we had left the bar.

Q Oh, I see. Now, you say "after we had left the bar"; did you leave LaBella's after your return from McCaffrey's? Did you leave LaBella's in company of the defendant Henry as well as Purkhiser?
A Yes, sir.

Q And in what vehicle, what type of vehicle did you leave LaBella's in?
A A panel truck.

Q Who was driving the panel truck?
A Henry was.

Q Where was Purkhiser?
A He was seated on the right of the passenger side.

Q Where was Luke at this time?
A He was following us on his motorcycle.

Q Do you recall how he was dressed?
A No, sir.

Q Now, do you recall what if any weapons that you observed in the truck at the time the truck left LaBella's?

A There was a baseball bat and a billy club and an ax.

Q I hand you State's Exhibit 28. Does this look like the ax that was in the truck?

A It is the same size.

Q You say the defendant Henry was driving the truck when you left LaBella's. Where did you go after leaving LaBella's?

A We went to Roy Griffin's house.

Q After leaving — or, when you got ready to leave Griffin's house, or at any time after that, what if anything did you observe the defendant Luke bring into the truck?

A He put a tire iron in the truck, in the back.

Q What other weapons did you observe after leaving Griffin's, in addition to this tire iron that the defendant Luke brought into the truck?

A At that time, nothing.

Q All right. Then, following the stop at Griffin's house — Incidentally, do you recall where that stop is? Where Griffin lives?

A In Davie.

Q Is that a few miles from LaBella's?

A Yes.

Q Is that north and west?

A Yes.

Q Then, following the stop at Griffin's house, who was still driving the truck?

A John Henry was.

Q Then, where did the truck proceed?

A We went to Crossroads, State Road 84 and State Road 7, it is a bar, and we got one, possibly two six-packs of beer, and —

Q Then where did you go?

A Then we went to Ray Stidham's house.

Q That is the defendant Stidham?

A Yes, sir.

Q Now, what happened at Stidham's house that you recall, or while stopped at Stidham's house?

A Ray Stidham and Jimmy Gallagher got into the truck.

Q All right. Where did the defendant Stidham get into the truck?

A He got into the front.

Q So that, when the truck left Stidham's house, the defendant Henry was driving?

A Yes, sir.

Q The defendant Stidham was in the front seat?

A Yes, sir.

Q Purkhiser was in the front seat?

A Yes, sir.

Q And the defendant Luke was in the back?
A Yes, sir.

Q And where were you?
A I was in the back, also.

Q Where in the back were you at this time?
A I was sitting toward the front.

Q Do you recall on what side, the driver's side or the passenger side?
A The driver's side.

Q Now, what remark do you recall the defendant Henry stating at or about this time?
A Somebody asked if they got Stidham and he says, "Yeah, we got Stidham and we have got his gun, too."

Q Now, the truck then proceeded northward?
A Yes.

Q Now, where did the truck proceed to, where did it go to?
A To the store on Hammondsville Road.

Q How many people were in the truck at that time?
A Seventeen.

Q Now, when you got to the store, was the arrangement still the same? That is, the seating arrangement, was it still the same?
A Yes.

Q Enroute from Stidham's to the store in Pompano Beach, did you observe any additional weapons in the back?

A Yes, sir.

Q What was that?

A A gun. Roy Griffin had it, and somebody said, "let me see that gun, Griffin," and he held it up and said, "You can see it but you can't touch it."

Q Was that done in the presence of the defendant Luke?

A Yes, if he saw it. I don't know if he saw it or not, though.

Q I mean, Griffin was in the back of the truck, wasn't he?

A Yes, he was.

Q And so was the defendant Luke, when the statement was made?

A Yes, sir.

Q When you got to Hammondsville Road, did you stop at the store where the fight had taken place?

A Yes, we did.

Q Then who got out of the truck at that point?

A Jimmy Purkhiser and Ray Stidham. Jimmy said did he want to go along and do this and Ray Stidham stood by the truck and then Jimmy brought a colored man over and he said, "This man is going to take me to Miguel Rivera's house," and Stidham said, "We will follow you." And we lost them at one point and I don't

know where we stopped. I think it was at another store. Then, Ray Stidham got in the car with the colored man and we proceeded to Miguel Rivera's home. Do you want me to continue?

Q You say when you proceeded to Miguel Rivera's home you didn't know whose home you were proceeding to?

A What we thought was Miguel Rivera's home.

Q About what time of night on December 5, 1965 was this when you got up to this labor camp at Pompano Beach?

A I would say around ten o'clock.

Q All right. Now, as you went into the labor camp, the defendant Stidham and Purkhiser were with the colored man, is that correct?

A Yes, sir.

Q And the defendant Henry was still driving the truck?

A Yes, sir.

Q And the defendant Luke was still in the back?

A Yes, sir.

Q Now, did you stop at a house?

A Yes, we did.

Q Would you tell us, please, what happened when the truck and the car stopped at the house?

A Well, somebody said, "This is it." People started jumping out of the back of the truck and—and Jimmy

and Henry went to the door of the house and Ray Stidham went to a window and Luke was in the yard between the truck and the yard — I mean, the house, excuse me.

MR. STAHL: I think she should talk a little louder.

A JUROR: I can't hear her.

Q Speak up, if you will. You say the defendant Henry and Purkhiser went to the porch?
A Yes, sir.

Q Now, when the defendant Henry went to the porch, what if anything did he have in his hands?
A An ax.

Q Was that the same ax that was in the back of the truck?
A It was the only one I saw.

Q Okay. Then you say the last time you saw Stidham, the defendant Stidham, he was at a window of the house?
A Yes.

Q And the last time you saw the defendant Luke, he was in the yard?
A Yes.

Q Between the truck and the porch, is that correct?
A Yes.

Q Now, what did you see and hear after Purkhiser and Henry got to the porch?

A I think Ray Stidham said, "They have got guns, Jim," or something like this, and then somebody else said, "Shoot", and I heard shots and then everybody ran back into the truck.

Q Did you hear a child scream from the house, Miss Fields?

A Yes, sir.

Q Did you hear two shots from the house?

A Yes, I did.

Did you hear two shots from the house?

A Yes.

Q And then, after you heard the shots from inside the house, what did you see Purkhiser do?

A He ran back to the truck.

Q What did he have in his hands when he ran back to the truck?

A He had a gun.

Q What kind of gun was it, a pistol?

A Yes.

Q What did Stidham do after the shots came from the house, after you heard the shots in the house and the child scream, what did you see Stidham do?

A He got into the front of the car on the driver's side and we drove off.

Q Now, when Purkhiser and Stidham got back into the truck, both of them were in the front seat, is that correct?

A Yes, sir.

Q The defendant Stidham was behind the wheel?
A Yes, sir.

Q And Purkhiser jumped in the right side of the front seat, is that correct?
A Yes, sir.

Q Now, what if anything did you ask Purkhiser in Stidham's presence?
A I asked him if he had shot anybody and he said, "I think so." Then, I asked him if he had killed anybody and he said, "I don't know."

Q Now, what did Stidham say about leaving?
A (No response.)

Q What remark did he say about leaving at that point? What did he say to anybody that you heard him say?
A I don't remember.

Q All right. Now, what did you observe the defendant Henry to do after the shooting?
A He jumped in the back of the truck and he said—he said to Jimmy, "It is a good thing we are friends because I almost got myself killed for you."

Q What did he do with the ax?
A He threw it in the back of the truck.

Q Did he get in the back?
A Yes, he did.

Q How did Stidham drive the truck away?
A You mean, fast or slow or —

Q Yes.
A Fast.

Q Where was he heading?
A Back to LaBella's.

Q Now, on the way back to LaBella's, Stidham was driving?
A Yes, sir.

Q The whole time?
A Yes, sir.

Q All right. Now, what do you recall Stidham saying on the way back to LaBella's as to your being followed?
A He said it looks like we are being followed and he pulled alongside of the road and he said everybody out.

Q What did he say if anything that he was going to do if the following vehicle attempted to pass or pull up?
A I don't remember.

Q All right. After he stopped the car, what did he say to everybody in the truck?
A He said everybody out.

Q What did everybody do?
A Everybody got out.

Q What if anything do you recall the defendant Stidham saying about his next door neighbor on the way back?

A I don't know.

Q Did you hear any of the defendants here today use the word "alibi" on the way back?

A I could have; I don't remember.

Q Did the defendant Henry drive the truck in a normal fashion? Did you notice anything unusual about the way the defendant Henry drove the truck up?

A (No response.)

Q He appeared to be sober, in other words, didn't he?

A He was swerving a little bit, if that is what you mean.

Q Did he appear to be sober?

A He seemed to be, but I had never seen him before; I don't know how he is when he is drunk.

MR. GLICKSTEIN: Would the Court give me a minute to examine my notes, please?

THE COURT: Permission granted. It is three o'clock; we will have a five-minute recess. Gentlemen of the jury, again, the Court admonishes you not to discuss this case among yourselves or to permit anyone to discuss it with you and, with that, we will have a five-minutes recess.

(Whereupon, a recess was taken, after which time

Court convened, the jury returned to the Courtroom, and the witness, Gerry Fields, who was on the witness stand at the time of the recess, resumed the witness stand.)

THE COURT: You may proceed.

MR. GLICKSTEIN: No further questions of this witness, your Honor.

THE COURT: You may inquire.

CROSS EXAMINATION

BY MR. IVES:

Q Miss Fields, going back to the late evening of the 5th of December, last year, now who were you with? Who were you with?

A I was with Chuck Smith.

Q You were with Chuck Smith?

A Yes, sir.

Q Now, then, was James Purkhiser with you and Chuck Smith?

A Yes, sir, he was.

Q And who was with James Purkhiser?

A Lillian Wagner.

Q Where had you people been?

A We had been to West Palm Beach.

Q Now, then, on the way back, what was the reason for stopping at this Hammondsville grocery?

A Well, we were going down State Road 7, heading south, and a Puerto Rican tried to run Jimmy off of the road, or so it seemed, and we followed him to find out why he did it and we stopped him in the middle of the road — rather, he stopped himself and we pulled up beside him and Jimmy asked him why he did this and I didn't hear his answer because he was in the car and I was on the motorcycle and he just took off and we followed him.

Q Were you on a motorcycle?
A Yes, I was.

Q Was Chuck Smith driving this motorcycle?
A Yes, he was.

Q Was Mr. Purkhiser on a motorcycle?
A Yes.

Q Was the Wagner girl behind Purkhiser?
A Yes, sir.

Q All right. And so, this Rivera now, have you seen the man that tried to run you off the road that day here in Court today?
A Yes, sir.

Q You have seen him?
A (No response.)

Q All right.

THE COURT: Just a minute. I don't know that she has seen him in court. I don't think she has been in the courtroom.

Q Have you seen him here at the courthouse?
A Yes, sir.

Q Do you know his name?
A I didn't at the time; I do now.

Q Now, what do you know his name to be now?
A Miguel Rivera.

Q Miguel Rivera?
A Yes, sir.

Q And you have seen him here in the courthouse today?
A Yes, sir.

Q And he is the one that tried to run you off the road?
A Yes, sir.

Q All right. Now, then, is that why you were down at this Hammondsville grocery, to talk with him?
A Yes, sir.

Q Now, what transpired there at the Hammondsville store when you tried to talk to Miguel Rivera? What happened?
A He jumped out of his car and pulled a gun on us.

Q He pulled a gun on you?
A Yes, sir.

Q You saw that?
A Yes, sir, I did.

Q Then, when he did that, what happened?

A Jimmy said, "This is just between you and myself; I don't want anybody else involved."

Q All right.

A And then —

Q Was anybody else involved?

A Yes, sir.

Q Tell the jury what happened there then?

A Well, he started yelling something in Spanish and I couldn't understand it, and about 25 or 30 Puerto Ricans appeared, some from out of the store and some from no where.

Q What did they do?

A Well, they had benches and baseball bats and sticks in their hands.

Q What did they do with all of those weapons?

A They were beating up on Chuck and Jimmy.

Q They beat Chuck Smith and Jimmy Purkhiser?

A Yes, sir.

Q I see. Now, then, do you remember an officer coming up there about that time?

A Yes, sir.

Q Did the officer come up when all this beating was going on?

A Well, I was across the street, because I was going to call the Sportsman's Inn, when somebody said it is the

law coming. I ran back across the street and I caught him saying, "I can't do anything about this, you all had better leave."

Q In other words, can you tell this jury whether that officer was there and present and knew there was a fight going on, that somebody knew somebody was being beat up? Was he aware of that, the officer?

MR. GLICKSTEIN: If it please the Court—

Q (Continuing) From what you saw?

MR. GLICKSTEIN: The question is objectionable as to what the officer was aware of.

THE COURT: Objection sustained, but I would suggest, Mr. Ives, you reframe your question.

MR. IVES: Yes, sir.

Q I want you to tell the jury then exactly how much of this fight was going on, or what was transpiring at the time the officer came up there and made this statement that you are talking about?

A Well, everybody kind of stopped then. I don't know what he saw because, as I said, he had just pulled up as I was coming back across the street.

Q Then what statement did he make?

MR. GLICKSTEIN: If it please the Court, there have been several objections on the grounds of hearsay by Mr. Ives, I believe, when the State attempted to elicit

the conversations between the officer and some of these people, so the objection — apparently, what is sauce for the goose —

THE COURT: You will make your objection, Mr. Glickstein. Read the question.

(Question read.)

THE COURT: Would you clarify your question?

Q What statements did the officer make to the participants there?

MR. GLICKSTEIN: Now, as I understand it, your Honor, several objections were sustained by your Honor when the State attempted to elicit what conversations took place between Miguel Rivera — or the officer and Miguel Rivera and Purkhiser, and the objection was made by defense counsel that all these remarks were hearsay because none of these defendants were present. So, it appears, your Honor, if it is hearsay as to one, it might be hearsay as to all.

THE COURT: Let me think about it a moment.

MR. IVES: Your Honor, my position is this, that the officer has testified what has transpired. He testified that he told them to go on. Now, I want to know from her what he said, since she was there.

THE COURT: Within that limited area, I will overrule the objection, but I agree with counsel for the State, you can't go far afield in this matter of hearsay. None of these defendants were present and I understand the

purpose of the interrogation, so with that limited area, I will permit the witness to answer. Miss Fields, do you understand what the Court is saying?

THE WITNESS: Yes, sir, I do.

BY MR. IVES:

Q In other words, you just tell us the best you recall the statements that the officer made to these participants in this fight, what did he say to them, briefly?

A He said, "I can't do anything here at this time, you all better go on and get out of here."

Q He said, "I can't do anything at this time?"

A Yes, sir.

Q Did he tell them what to do or anything of that kind?

A Just to leave.

Q He said just leave?

A (Witness indicated affirmative response.)

Q Then, to your knowledge, did he actually make any arrest of anybody there at that time, to your knowledge?

A No, sir, he didn't.

Q Now, then, did I understand you to say then that you left there and you went to LaBella's?

A Yes, sir.

Q Is that where you went from the Hammondsville store?

A Yes, sir.

Q You went to LaBella's and you said Purkhiser made a phone call, is that right?

A Yes, sir.

Q Did you stay at LaBella's any length of time?

A You mean, me, myself?

Q Yes.

A For about — just about five minutes after the phone call.

Q About five, after the phone call?

A (Witness indicated affirmative response.)

Q Now, do you know where the Sportsman's Inn is?

A Yes, sir.

Q Do you know where that is?

A Yes, sir.

Q How far would that be from LaBella's? Do you have any idea?

A It is about a three to five minute drive.

Q Three to five minute drive?

A Maybe less; possibly more.

Q Now, then —

THE COURT: I am sorry, I didn't hear it. Did she say 35 minutes?

MR. IVES: No, sir. About a three to five minute drive.

THE COURT: All right.

Q Do you know that he made a phone call to the Sportsman's Inn?
A Yes, sir.

Q He did? Purkhiser?
A (Witness indicated affirmative response.)

Q As a result of this phone call, did anyone come to LaBella's?
A Yes, sir.

Q All right. Now, who came to LaBella's, that you know of?
A The defendant Luke and Paul Mahoney.

Q Wait a minute. Who first?
A Luke, John Luke.

Q John Luke came in LaBella's?
A Yes, sir.

Q Then, who else came in?
A Paul Mahoney.

Q Paul Mahoney. All right. Who else came in?
A I don't remember.

Q Well, were there many came in?
A No, just two or three.

Q Two or three?
A Yes, sir.

Q Now, then, I believe you have testified, too, that you requested John Luke to take you some place. Where did he take you?

A He took me to where myself and several other people were living at the time on Pierce Street.

Q You and some other people were living at this particular place?
A Yes, sir.

Q Now, what did you do when you got there?
A Rick McCaffrey was there and I told him —

MR. GLICKSTEIN: If it please the Court, same objection will be made as to hearsay.

THE COURT: Objection sustained.

Q Rick McCaffrey was there. Did Rick McCaffrey go with you?

A He didn't — You mean, when we came back to LaBella's?

Q That's right.
A No, sir.

Q Did anyone else there at that place go with you?
A No, sir.

Q Did you continue going with Luke?
A Back to LaBella's?

Q Yes.
A Yes, sir.

Q Now, then, when you got back to LaBella's, what did you do next?
A I put a billy club and a baseball bat in the back of the truck.

Q A billy club and a baseball bat?
A Yes, sir.

Q Now, then, the defendant Luke, he had nothing to do with a baseball bat or a billy club, did he?
A No, sir.

Q You never saw them in his hands at any time?
A No, sir.

Q Did he ever in your presence threaten anybody at all with a billy club or baseball bat?
A No, sir.

Q Now, then, when you got to LaBella's there, — by the way, who did this truck belong to?
A Adrian Chambers.

Q Was he with you that night?
A Yes, he was.

Q Where did you get this truck?
A It was at LaBella's.

Q It was at LaBella's?
A Yes, sir.

Q Now, then, were there a lot of people there in LaBella's?
A Quite a few, yes, sir.

Q I want to remind you of something, I want to get something straight about a statement Purkhiser made in everybody's presence, or rather, did he make this statement and did you testify that Purkhiser made this statement, that he was beat up by about 25 Puerto Ricans and he wanted to recruit enough people to go up there and make sure that Miguel Rivera gave him a fair fight? Is that in substance what you testified to?
A Yes.

Q Is that what he told everybody?
A Meaning the same thing, but not those words.

Q Well, did he say that in substance?
A Yes.

Q In other words, he wanted a group of people to go with him up to find Miguel Rivera and make Rivera give him a fair fight, is that right?
A Yes, sir.

Q Now, then, when he made that statement, is that when a group of people got in this truck?
A Yes, sir.

Q Now, do you know that John and some of these boys belong to a motorcycle club?
A I don't know.

Q You don't really know about that?
A (Witness indicated negative response.)

Q Were there people that got in that truck that you didn't even know?
A Yes, there were.

Q People there you had never seen before, is that right?
A That's right.

Q That got in the truck?
A Yes, sir.

Q Was that due to the statement that Purkhiser made, that he wanted somebody to help him get a fair fight?
A Yes, sir.

Q All right. Now, then, how many people got in the back of this truck?
A There were twelve of us in the truck.

Q There were how many in the back of the truck?
A Twelve. You mean, in the back or the whole truck?

Q Ma'am?
A You mean in the back or the whole truck?

Q I am talking about in the back of the truck.
A Wait just a minute.

Q Wasn't there a wire separating the front from the back?

A Yes, sir.

Q A wire partition, screened partition?

A Yes.

Q I want to know if you can recall how many people got in the back of that screened partition.

A At that time, there were eight.

Q Eight?

A Yes.

Q Then, was anybody else picked up?

A Well, Luke left his motorcycle at Roy Griffin's house and Roy Griffin and himself got into the back and then, later, Jimmy Gallagher got into the back.

Q So that made, all told, eleven people in the back?

A Yes.

Q And how many were in the front?

A Wait a minute. There were 17 after everybody was there. See, there were twelve in the back and five in the front.

Q Twelve and five, is that correct?

A Yes, sir.

Q Now, then, Miss Fields, would you please come over here, please? Leave your chair and come over here. by the jury?

(Witness goes to jury box.)

Q Now, I hand you here State's Exhibit 20 and ask you if that appears to be the truck?

A It was that type of truck.

Q That type of truck? Hold it up there to the jury there. That was the type of truck that everybody was in that night, is that right?

A Yes, sir.

Q All right, ma'am. Now, I hand you here State's Exhibit 21. Does that appear to be the same truck that everybody was in that night?

A Yes, sir.

Q All right, ma'am. Now, I hand you here State's Exhibit 22 and ask you if that appears to be the back end of the truck?

A Yes, sir.

Q Now, I want you to show the jury there, is that the baseball bat that you put in the truck? Does that appear to be the baseball bat you put in the truck?

A Yes, sir.

Q Can you find the billy club in there that you put in the truck? Does that show anywhere?

A I don't see it.

Q Now, ma'am, show the jury here, if you can, where you were sitting in the truck when you started up to Pompano Beach to this grocery store on Hammondsville Road, about where?

A I was sitting about right here, where the tire is.

Q Can you tell us about where John Luke was sitting?

A He was sitting in the very back.

Q He was sitting in the very back? Here?

A On the left-hand side.

Q On the left-hand side? Allright, ma'am, if you will go back and have your chair.

(Witness resumes witness stand.)

Q Now, then, I believe that you testified that you heard some statements made by John Henry while he was driving the truck, is that correct?

A Yes, sir.

Q Now, was everybody in the back — Was it noisy there in the back?

A Very much so.

Q Very, very noisy?

A (No response.)

Q Was there a lot of talking and laughing going on?

A Not too much laughing, but a lot of talk.

Q A lot of talk? Was there also some drinking going on back there?

A Yes, sir.

Q Where was the two six-packs of beer, if you recall?

A It was in the back, just being passed around to everyone.

Q Did you see John Luke drink some beer?

A It was back — There was a six-pack back that way, but I didn't see him, because I wasn't that close to him.

Q Now, then, in other words, you are not sure whether he had any of it or not?

A Yes, sir.

Q Now, then, when you left the bar, then did you go to this grocery on Hammondsville Road?

A No, sir.

Q When you left LaBella's?

A No, sir.

Q Where did you go first?

A We went to Roy Griffin's house.

Q After you left Roy Griffin's house, what I want to do is try to keep this as brief as possible. Let's get on up to Hammondsville Road. Did I understand you to say that somebody got out of the car and talked to a colored fellow?

A Yes, sir.

Q That wasn't John Luke, was it?

A No, sir.

Q And the people talked to some colored fellow that was out of earshot of you people in the car, wasn't it?

A Well, they were by the front of the truck.

Q Would there be any way for John to overhear anything that was said, as far as you could tell?

A I don't think so.

Q You don't believe he could hear anything? All right. Now, that is fine. Now, as a result of these people talking in the front, then you said somebody got in a car with a colored fellow. Who was that?

A That was Jimmy Purkhiser.

Q Did Mr. Stidham get in the car?

A Not at that time.

Q Now, where did you go then when Purkh[illegible]nd this colored fellow that was driving this car — where did you go? Where did he take you?

A Well, we were following him. I didn't know — you know, I knew where I was, but not the streets or anything, and he was taking us to what was supposed to be this Puerto Rican's house.

Q The colored fellow was supposed to be taking you to Miguel Rivera's house?

A Yes, sir.

Q So far as you know, or everybody knew, that is where you were going?

A Yes, sir.

Q Rivera's house?

A (No response.)

Q Then, where did you go from this Hammondsville grocery, where did you go next?

A Well, as I said before, we lost them somewhere along the way and then we stopped at a store and they met up with us again and Ray Stidham got into the car with Jimmy and the colored man.

Q And Jimmy Purkhiser and the colored fellow, and Stidham got in the car with them?

A Yes, sir.

Q Was John Luke still sitting 'way back in the back?

A Yes, he was.

Q Then, after Mr. Stidham got out of the car and got in with Mr. Purkhiser and the colored man, then where did you go then?

A Then, we proceeded to what we thought was this man's house.

Q Did you stop at what you thought was this Rivera's house?

A Yes, sir.

Q Did you see anybody go into the house?

A No, sir, I couldn't see inside of the house; I could just see the porch.

Q Did you see anybody from the truck go up to the house?

A You mean, was anybody up at the front of the house from the truck?

Q Yes. Did anybody go from the truck up towards the house?

A Yes, sir.

Q Well, first, let me ask you this. Was the colored fellow there in his car?

A I don't remember if he left or if he stayed there.

Q You don't remember whether he left or whether he stayed?

A Yes, sir.

Q Did you see Mr. Purkhiser get out of the car?

A No, sir.

Q Did you see Mr. Stidham get out of the colored fellow's car?

A No, sir.

Q When did you first see anybody get out of either the car or the truck?

A Well, as I said, someone said this is it and then—

Q Now, this someone that said this is it, was that somebody in the truck or was it somebody out of the truck?

A That was someone in the truck.

Q In the truck; you don't know who it was?

A No, sir.

Q Now, then—and then everybody piled out of the truck?

A Just about everybody.

Q About how many of them?

A All but six.

Q All but six?

A Yes, sir.

Q Now, could you tell us who those six were that didn't get out?

A Yes, sir. Adrian Chambers; Lillian Wagner; Paul Mahoney; Chuck Smith; Ricky McCaffrey; and myself.

Q In other words, these six people did not get out of the truck, is that right?

A That's right.

Q Now, where were you in the truck when the others got out?

A Well, as everybody was getting out, I was going towards the back so I could see what was going on.

Q You went towards the back? Were you able to see anybody then leave the truck or the other car?

A Yes, sir.

Q All right. What did you see? Just tell us what you saw?

A Well, I saw Jimmy—I didn't see them get out of the car; I saw them go away from the car towards the house, Jimmy and Stidham.

Q Did you see Mr. Purkhiser go towards the house?

A Yes, sir.

Q Did you see Mr. Henry go towards the house?

A Yes, sir.

Q Did you see Mr. Luke go towards the house?

A I didn't see him get up to the house; he went towards it.

Q You never did see him go to the house?
A No, sir.

Q Where was Mr. Luke all the time you were observing this?
A He was midway between the house and the truck.

Q Midway between the house and the truck? I hand you here, Miss Fields, State's Exhibit 18 and ask you does that appear to be the house?
A Yes, sir.

Q Now, would you step over here and show us about where the truck was parked? Show the jury, please, ma'am.

(Witness goes to jury box.)

Q Would you show the jury with reference to this house about where the truck was parked approximately, if you can?
A Well, we parked — we were parked about here and the back of the truck was facing the porch of the house.

Q Point out to the jury where you say "we were parked about here", put your finger about where you were?
A Right there.

Q Right along in here? Can you gentlemen see this? The truck was parked with the back facing the house, is that right?
A Yes — well, kind of.

Q Were the doors of the back end of the truck open?
A Yes, sir.

Q Is that the way you were able to see somebody walk towards the house?
A Yes, sir.

Q Now, then, would you point out approximately where you saw, during the time you saw this thing, where you saw John Luke?
A (No response.)

Q Could you tell me approximately where you saw him?
A I couldn't indicate; I could just say midway.

Q Well, let me ask you this, if you will look at this picture, Miss Fields, you said the truck was parked right along in here?
A Yes.

Q With the back towards the house. About how far between this porch and the back end of the truck would you say John Luke was?
A He was about here. He wasn't too close to the porch at all.

Q Oh, I see. In other words, what appears to be a Ford coupe here, would you say he was approximately at what appears to be the front end of this Ford coupe?
A Yes, sir.

Q That is where John Luke was, is that correct?
A Yes, sir.

Q All right, go back and have your seat.
(Witness resumes witness stand.)

Q Now, then, there was nothing to block your vision, was there?
A No, sir.

Q You could see that, couldn't you?
A Yes, sir.

Q And you know John Luke, don't you?
A Yes, sir.

Q He never got any closer to that house than what you pointed out, the front end of this Ford automobile, is that right?
A I didn't see him.

Q You didn't see him go up on the porch at all?
A No, sir.

Q Did you see anybody else up there?
A Yes, sir.

Q Who did you see?
A John Henry and Jimmy Purkhiser.

Q But you didn't see Mr. Luke up there?
A No, sir.

Q Did you see Mr. Stidham anywhere?
A Yes, sir.

Q Where did you see Mr. Stidham?
A He went to a window.

Q Went to a window? Now, then, did you see anything at all in Mr. Luke's hands?

A No, sir.

Q Anything at all in his hands, any type of weapon or anything?

A No, sir.

Q Did you hear Mr. Luke at any time during the entire time you rode up to this place threaten anybody or say what he was going to do to anybody?

A No, sir, not that I remember.

Q Never heard him make any threats of any kind to anyone?

A Not that I recall.

Q As to what he would do? And you never saw him standing there that night with any kind of a weapon in his hands?

A No, sir.

Q Let me ask you this, you heard some shots, didn't you?

A Yes, sir.

Q How many shots did you hear, approximately?

A About ten, maybe more.

Q You heard about ten shots? Now, you know that John Luke didn't have a gun in his hands, don't you?

A Yes, sir.

Q All right. Now, was John Luke standing there a considerable distance from the porch at the time you heard the first shot?

A Would you repeat the question?

Q I said, was John Luke standing where you said he was standing at the time that you heard the first shot?

A Yes, sir.

Q Then, did he come back to the truck?

A Yes, he did.

Q In what manner?

A He was running.

Q He ran back to the truck, is that correct?

A Yes, sir.

Q All right, ma'am. Now, then, did he get in the truck?

A Yes, he did.

Q Let me ask you this now, you had a chance to talk to him and observe him — First, let me ask you this. I know you are only 17 years old, but have you — I know young people have seen a whole lot more than I did in my time. Have you seen people that were intoxicated?

A Yes, I have.

Q Have you seen quite a few?

A Yes, sir.

Q I want you to tell the jury, as a matter of fact, wasn't John Luke on that particular evening highly intoxicated?

MR. GLICKSTEIN: If it please the Court, this was not inquired of this witness on direct examination; it is beyond the scope and the State objects to it.

THE COURT: Objection overruled.

Q You may answer. As a matter of fact, wasn't he highly intoxicated?

A Well, I don't know about on booze, but I know he was hopped up on pills.

Q Hopped up on pills?

A Yes.

Q Didn't he have alcoholic beverages, too?

A Well, he could have; I didn't see him drinking.

Q You didn't see him drinking?

A No, sir.

Q You know he was hopped up; you know he wasn't normal?

A Yes, sir.

MR. GLICKSTEIN: If it please the Court, I move to strike all this testimony, not only as being beyond the scope of any of the direct, but also as being not responsive to the question of counsel for the defendant Luke. That goes to any of the testimony of this witness as to being hopped up on pills. Further grounds, your Honor, I ask that it be stricken on the grounds there is no basis for this particular witness to render any conclusion in this regard.

THE COURT: There will be no further interrogation along this line. Objection sustained.

MR. GLICKSTEIN: I will ask that the jury be instructed to disregard any of the remarks of the witness that this particular defendant was hopped up on pills.

THE COURT: Overruled. The jury may consider any part of it.

BY MR. IVES:

Q All right. Then, I want you to describe how—describe his appearance there at the time that you saw him standing out half-way between the truck and the house? What was he doing? What did you see?

A Well, I don't understand your question, sir.

Q Just describe how he was standing there. Was he standing there in a normal manner or abnormal and, if so, describe what you saw?

A I don't remember.

Q You don't remember?

A No, sir.

Q All right, ma'am. Now, then, do you remember whether there was—Was it dark out there that night?

A Fairly dark.

Q Fairly dark?

A Yes, sir.

Q And you say you heard eight or ten shots?

A Possibly more.

Q Possibly more?
A Yes.

Q Do you know whether any of the shots hit the truck or not?
A It sounded like they did.

Q In other words, it sounded to you like one of the shots hit the truck, is that correct?
A Yes, sir.

Q Now, Miss Fields, do you know how many of the people that were in that truck that night were arrested?
A (No response.)

Q Do you know how many?
A Altogether?

* * *

BY MR. STAHL:

Q Miss Fields, did you ever see Hubert Ray Stidham with a gun or pistol that evening of December 5, 1965?
A No, sir.

Q I believe you have testified that you saw a pistol in the hand, or a gun in the hand of Roy Griffin on the way up there, is that correct?
A Yes, it is.

Q Did you see any other guns on the way up to the labor camp?
A No, sir, I didn't.

Q You don't know where, of your own knowledge, where Purkhiser got the gun from that you eventually saw in his hand, do you?

A No, I don't.

Q Now, you say that you saw Purkhiser and Stidham walking towards the house at the labor camp?

A And Henry.

Q And Henry?

A Yes, sir.

Q Now, Stidham did not go up on the porch, did he?

A No, sir, he didn't.

Q Do you know what window he looked into of the house?

A (No response.)

Q I show you this photograph to help you refresh your memory.

A Mr. Stahl, I believe he was going towards this one, but I can't say for sure because I don't remember.

Q You believe he was going towards this window here?

A Yes, but —

Q You don't know for sure, do you?

A No, sir.

Q When Mr. Stidham was going towards the house, you didn't see a gun in his hands, did you?

A No, sir.

Q Now, I believe you have testified that when Mr. Stidham was there by the house, that you heard him say that the Puerto Ricans had guns?

A Yes, I did.

Q Did you hear Mr. Stidham say something to the effect, to Purkhiser and Henry, get out of there, let's go, they have got guns?

A Well, he yelled something but I don't remember exactly what it was.

Q Was it something similar to what I have just said?

A I couldn't swear to it.

Q Now, you testified that you heard somebody shout, "Shoot." You don't know who shouted that, do you?

A No, sir, I don't.

Q Now, when Stidham made reference to the fact that the Puerto Ricans had guns and said something to Purkhiser and Henry standing on the porch, did Stidham immediately run back to the truck and get in the driver's side at that point?

A Well, right as the shots were being fired, he did.

Q Right as the shots were fired?

A Yes.

Q Now, actually, the shots were fired right immediately after Stidham said the Puerto Ricans have guns, weren't they?

A Yes, they were.

Q And when these shots were being fired there on the porch, Stidham was running back to the truck?

A Yes, sir.

Q Now, could you see up on the porch where Purkhiser and Henry were standing?

A Well, I saw Purkhiser go on the porch, but I didn't see him after that, but Henry was standing on the very edge of the porch, towards the yard.

Q Towards the yard?

A Yes, sir.

Q Just standing there with the ax in his hands?

A Yes, sir.

Q You didn't see Henry try to use this ax on anybody, did you?

A No, sir.

Q You didn't see Henry with a gun, did you?

A No, sir.

Q And did you hear Henry say anything while he was up there on the porch?

A No, sir.

Q What did Henry do when the shooting started?

A He ran, also.

Q Back to the truck?

A Yes, sir.

Q And when he jumped in the truck, I think you said eventually he made the remark to Purkhiser, "It is a good thing I am a friend of yours; I almost got shot over you?"

A Yes, sir.

Q Now, you say that on the way up there, you heard Henry say, "We have got Stidham and his gun, too." You heard that remark?

A Yes, sir.

Q Now, you didn't see any gun, did you?

A No, I didn't.

Q And did Henry get out of the truck at Stidham's house, or he stayed there behind the wheel, the driver?

A Now, I don't know if he went up to his house, but he did get out of the truck.

Q Nobody else said anything about Stidham having a gun, did they?

A No, sir.

Q A lot of commotion in that truck, wasn't there?

A Yes, sir.

Q Now, did you see Stidham in any manner aid or help Purkhiser to shoot into the house?

MR. GLICKSTEIN: State objects, your Honor. Same objection made before, it calls for conclusion and invades the province of this jury.

THE COURT: Objection overruled.

A Would you repeat the question?

Q Did you see Stidham aid or help Purkhiser in shooting into the Puerto Rican house?

A No, sir.

Q Did you ever hear Stidham talking to Purkhiser about going to the Puerto Rican's house and killing someone?

A No, sir.

Q Actually, the purpose of going up there was to have a fight, wasn't it?

MR. GLICKSTEIN: State objects. Your Honor, again, this question invades the province of the jury.

THE COURT: Objection sustained.

Q Who made the remark that we are going to the labor camp to have a fight?

A Well, nobody made that exact remark.

Q Well, Purkhiser made some sort of remark, didn't he?

A Yes, he did.

Q Exactly what did Purkhiser say?

A Well, he was talking and Chico was standing there and he said — Chico said, "What happened to you?", because he had been beat up pretty badly, and Jimmy said, "Well, I got beat up. I want to go back up there and fight this guy, but there is all these Puerto Ricans around." Chico said, "Well, we will go up there —" No. Jimmy said, "I need somebody to go up there and keep these people out so I can fight this guy," and Chico said, "We will go up there and see nobody else steps in."

Q There was no talk about going up there and killing anybody, was there?

A No, sir.

Q Did you see Chico aid or help Purkhiser in shooting into the Puerto Rican's house?

A No, sir.

Q Did you ever hear Chico — John Henry, talking to Purkhiser about going up there and killing somebody? You didn't hear Purkhiser and Henry have any conversation like that, did you?

A No, sir.

Q And when this shooting started, everybody started running back to that truck, didn't they?

A Yes, sir.

Q Now, tell me this, did John Henry have anything on his head when he went up there to the porch?

A John Henry?

Q Yes.

A No, sir, I don't think so.

Q And you don't remember Stidham with any hat on, do you?

A No, sir.

Q And how about Luke?

A Well, earlier, he asked me if he could wear my scarf and he put my scarf on his head. I don't know if he took it off or not.

MR. STAHL: All right, that is all.

REDIRECT EXAMINATION

BY MR. GLICKSTEIN:

Q What kind of haircut did the defendant Luke have on that night?

A He had a Mohican haircut.

Q Meaning, his head was shaved except in the center?

A Yes, sir.

Q You testified as to hearing eight to ten shots. You first heard two shots in the house, is that correct, Miss Fields?

A Yes, sir.

Q Following which, Purkhiser and the others ran back towards the truck, is that correct?

A Yes, sir.

Q You saw Roy Griffin discharge his weapon, that revolver — Did you see Roy Griffin fire his pistol towards the roadway?

A Yes, sir.

Q Did you see any Puerto Rican with a gun?

A No, sir.

Q The only persons you saw with pistols on this occasion were James Purkhiser and Roy Griffin, is that correct?

A Yes, sir.

Q You indicated that Griffin's gun was a revolver, is that so?

A That's right.

Q This sound that you heard that appeared to be — as you described it, what you thought was a shot hitting the truck, that was about the time Purkhiser was running back to the truck, isn't that true?

A Yes, sir.

Q And for all that you know, could have been a cartridge casing that hit the side of the truck, is that correct?

A I don't know what that sounds like.

Q Well, you don't know what it was that hit the side of the truck, do you?

A No, I don't.

Q You just heard what you thought was a sound hitting the side of the truck, is that correct?

A Yes, sir.

Q Back at LaBella's, before you all ever came up there —

A Sir?

Q Before you ever came to the scene —

A Yes, sir.

Q — did you hear the word "kill" being used?

A Not that I remember.

Q You don't remember. Now, at the scene, do you recall whether you had your eye on the defendant Luke all the time, or was he walking towards the house when you last saw him?

A Well, when I last saw him, he was, as I said, midway between the porch and the yard. Then I heard shots and I don't think he kept going towards the house.

Q My question was, did you have your eyes on him all the time?

A No, sir, I didn't.

Q The last time you did see him before the shots were fired, he was moving in the direction of the house, but he was still in the front yard, is that correct?

A Yes, sir.

Q Now, can you describe the tone of voice that the defendant Henry used at LaBella's when discussing this thing?

A Well, he wasn't a bit happy that one of his friends got beat up.

Q He was angry, wasn't he?

A Pretty angry, yes, sir; everyone was.

Q Did some of the others — strike that.

MR. GLICKSTEIN: I have no further questions.

THE COURT: The witness is excused.

(Witness withdrew.)

THE COURT: Do you have a short witness? It is the purpose of the Court to recess at 4:30. If you have a short witness, we will use him; if not, we will consider adjourning until tomorrow morning.

* * *

With those stipulations, your Honor, the State will call its next witness, Tito Flores.
AND THEREUPON,

TITO FLORES,

called as a witness on behalf of the State, being first duly sworn, testified through the interpreter, except when shown otherwise, as follows:

DIRECT EXAMINATION

BY MR. GLICKSTEIN:

Q State your name, please?
A Tito Flores.

Q Are you married, sir?
A Yes, sir.

Q How old are you, Mr. Flores?
A 49 years of age.

Q How many children have you?
A At home, there have been 15; five deceased; five living.

Q Five living, or ten living?
A Five living.

Q All right. Now, did you have a daughter by the name of Catalina Flores?
A Yes, sir.

Q Was she 11 years old on December 5, 1965?
A Yes, sir.

Q What is your occupation?
A Mine?

Q Yes.
A Out in the fields.

Q You work in the fields?
A Yes, sir.

Q Where were you living on December 5, 1965, Mr. Flores?
A At the project, house number 75.

Q In Pompano Beach?
A Yes, sir.

Q For how many years had you lived there with your family?
A Fifteen years.

Q Were you at home about ten o'clock, p. m., on the night of December 5, 1965?
A Yes, sir.

Q What members of your family were at home with you at that time?
A In my house there was Luis Navarro, Angel Luis Rosa —

Q They are not members of your family, are they?
A No, sir.

Q Was your little girl, Catalina, there?
A Yes, sir.

Q Where had you and Mrs. Flores been that evening, earlier?
A At the funeral home.

Q And then, after you had come home — strike that. At about 10:00 p.m. on that night, what was Catalina doing?
A She was watching television.

Q Did you see any strangers in your house at that time?
A Yes, sir.

Q Were the strangers Puerto Rican or North American?
A Americans.

Q Mr. Flores, I hand you State's Exhibit 1 and ask you if that man was in your home at that time?
A Yes, sir.

Q I hand you State's Exhibit 27 and ask you if that man was at your home at that time?
A Yes, sir.

Q Mr. Flores, could you tell us if you see in the courtroom now any of the North Americans who were at your home at that time?
A Yes, sir.

Q Would you please point them out?
A (Indicating) That one that is there and the one with the glasses.

Q The one on the side with the checkered coat?
A The last one here (indicating).

MR. GLICKSTEIN: May the record reflect the witness has pointed out the defendant Henry.

Q You have indicated also the one with glasses?
A Yes, sir.

MR. GLICKSTEIN: May the record reflect that the witness has identified the defendant Luke.

Q Where were these three North Americans when you saw them in your home at that time?
A Inside the house.

Q What were they doing?
A The one that killed the deceased had Luis Navarro at gunpoint; the other was standing alongside him with the ax in this position (demonstrating); the other one is behind the man with the ax with his hand behind his back.

Q Mr. Flores, when you say the man who killed the deceased, by "deceased", whom do you mean?
A He is not here; the one who killed the deceased.

Q No. By deceased, when you say deceased, do you mean your little girl, Catalina?
A Yes.

Q Mr. Flores, is this the man that killed Catalina?
A That one.

Q I am showing you State's Exhibit 1. Now, you say that the man that killed Catalina had first a gun pointed at Luis Navarro, is that correct?
A Yes, sir.

Q Where were you, Mr. Flores, when you saw this?
A Inside the house when I heard that they had arrived and the talking. When I came out, he changed the position of the pistol, fired, and the little girl was standing up and he went like this (indicating) and that is where he got the little girl.

Q Where were you when the little girl was shot?
A When he fired the shot, I went like this (indicating). I was right close to the little girl, about a foot and a half from the little girl.

Q Were you coming from the bedroom into the living room?
A Towards the living room.

Q How many times did this man shown in this picture fire the gun that he had in his hand?
A Inside, twice.

Q At the time that that man shot your little girl, where was the man who had the ax?
A Standing alongside him, with the ax in this position.

Q I am handing you, Mr. Flores, State's Exhibit 28. Do you recognize that, sir?

A Yes, sir. All these markings were on it when I saw it.

Q Would you show us, Mr. Flores, how the man held the ax as you saw him?

A (Demonstrating with ax) He had the ax in this position.

Q Mr. Flores, which man had the ax in his hand?

A That man there (indicating).

Q Indicating the defendant Henry. Did you see anything in the hands of the man with the glasses?

A No, because he was standing behind the other one, with his hand behind his back.

Q Mr. Flores, when you came into the living room and the man shifted the pistol towards the direction of you and the little girl, did you have anything in your hands?

A No, sir.

Q Mr. Flores, did you have any gun that night?

A Never.

Q Did any member of your family have any gun in your home that night?

A No, sir.

Q Did Luis Navarro have any gun that night?

A No, sir.

Q Did Angel Luis Rosa have any gun that night?
A No, sir.

Q Did you see any gun other than the one in the hand of the man who shot your little girl?
A No, sir.

Q Did you hear any shots before the two shots fired by that man?
A No, sir.

Q Before these shots were fired at Catalina, had there ever been any bullet holes in your home?
A No, sir.

Q After these two shots, were there bullet holes in your home?
A Yes, sir.

Q Before the shooting of Catalina, were there any bullets or projectiles in your home?
A No, sir.

Q Or any cartridge casings?
A No, sir.

Q Were there after the shooting?
A Yes, sir, after the shooting.

Q After Catalina was shot, what did she do, Mr. Flores?
A She ran to the room and said, "It got me here." (indicating)

Q Holding your left side?
A The left side.

Q Did she say anything more to you?
A She only said, "It got me." That is all.

Q Did you later see the cartridge casings in the house?
A Yes, sir.

Q Did they have any numbers or did it have any numbers written on it?
A Thirty-eight.

* * *

CROSS EXAMINATION

BY MR. IVES:

Q Mr. Flores, don't you consider yourself a North American?
A Of course, yes, sir.

Q Don't you consider yourself a citizen of the United States?
A Yes, of course.

Q Now, Mr. Flores, on December 5th of last year, the night of this shooting, had you ever seen this defendant John Luke before?
A Not before.

Q Now, on the evening that you say that you saw John Luke, did he have glasses on?
A No, sir.

Q On the evening that you say that you saw John Luke, did he have anything on his head?

A Which is John Luke?

Q This man right here (indicating).

A He had a haircut.

Q He had a haircut?

A A sort of a bunch of hair in the center.

Q Now, then, why were you able to recognize him?

A The hair changes, but the face does not.

Q In other words, you are basing your testimony today, the recognition of John Luke, on his face?

A Sure, according to his face.

Q All right. Where was the defendant John Luke at the time you say you saw him?

A Inside the house, behind this one that is here.

Q How far inside of the house was John Luke?

A He was closer here, inside the house, behind the other one, like this (witness standing behind interpreter.)

Q How far was the man that had the pistol inside the house?

A The three were close together.

Q Were all three inside of the house?

A Inside of the house.

Q Where was the door at the time that you looked and saw these three people?

A The door was behind and they were in front of it.

Q All three were in front of the screen door?

A Inside. Inside.

Q Inside. What did you see the man do with the gun?

A He had Luis at gunpoint.

Q I want that statement — what now, exactly, was the statement? He had Luis who at gunpoint?

A Luis Navarro. He had Luis Navarro at gunpoint.

Q Now, did you see John Luke do anything? (counsel touching defendant Luke)

A He did not do anything; he was just standing behind this

* * *

BY MR. GLICKSTEIN:

Q Mr. LaConte, on December 7, 1965, did you have occasion to have a conversation with Mr. Stidham about his activities on the night of December 5, 1965?

A Yes, sir.

Q Tell us about that, will you?

A He come over to the house. He wanted — He said

if anybody comes over, to say we were building a gun rack between ten and ten-thirty.

Q Between ten and ten-thirty on the night of December 5, 1965?

A Yes.

Q Did he tell you why?

A He said it was some hot water he was in. He didn't do nothing wrong.

Q In fact, and in truth, Mr. LaConte, were you and Mr. Stidham building a gun rack at that time?

A Not at that time, no.

Q As a matter of fact, you didn't see him after what hour on the night of December 5, 1965?

A About eight-thirty.

Q That was the last time you saw him?

A (Witness indicated affirmative response.)

* * *

AND THEREUPON,

JIMMY KEITH GALLAGHER,

called as a witness on behalf of defendants Stidham and Luke, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. IVES:

Q Would you state your name, please?
A Jimmy Keith Gallagher.

Q Where do you live? Where are you living at the present time, Mr. Gallagher?
A In Orange County at the courthouse.

Q At the courthouse?
A That's right.

Q In other words, are you in jail there?
A Yes, sir.

Q Now, then, do you know Mr. Stidham?
A Yes, sir.

Q Do you know John Luke?
A Yes, sir.

Q Do you know John Henry?
A Yes, sir.

Q Did you have occasion to see my defendant John Luke on the night of December 5th?
A Yes, sir.

Q Where is that you saw John Luke?
A He was in a group of people that came up to my house and picked me up.

Q He was with a group of people?
A Yes, sir.

Q And they came to your house?
A Yes, sir. Well, it is the house I was living at; it was a friend of mine's house.

Q Did you know all of those people?
A No, sir, not all of them.

Q Were some of them strangers to you?
A Yes, sir.

Q When they came up there to pick you up, did you go with them?
A Yes, sir.

Q Why did you go with them?
A Well, Jimmy Purkhiser told me that he had been in a fight with a bunch of people and he wanted me to go along to make sure the bunch of them didn't jump on him again.

Q And then what was he going to do?
A He went up there to fight a guy that had started this fight between him — earlier, between him and the other guy earlier.

Q What was the reason for you group of people being there?
A He wanted us to go along to make sure, you know, the whole bunch of them didn't jump on him again, like they had earlier.

Q Did he ask you at that time to kill or shoot anybody?

A No, sir, he did not.

Q Did he tell you he wanted you to hit anybody over the head with an iron?

A No, sir.

Q Any baseball bat?

A No, sir.

Q He told you just what you have said here?

A Yes, sir.

Q What did you believe you were going to see when you went up there?

A A fair fight —

MR. GLICKSTEIN: If it please the Court, I object to the question, what the witness believed he would see.

THE COURT: Objection sustained.

Q All right, sir. Now, where did you go from your house?

A First, when we first left the house, we went by a bar, the Crossroads Bar at State Road 84 and State Road 7.

Q Did you pick up anyone there?

A No, sir. Somebody went in and bought some stuff to drink.

Q Now, then, what kind of a car were you in?
A I believe it was a '56 Dodge pick-up truck, a panel truck, a closed truck.

Q Do you know who the panel truck belonged to?
A Yes, sir.

Q Who did it belong to?
A Adrian Chambers.

Q Adrian Chambers?
A Yes, sir.

Q All right, sir. Now, after you left the Crossroads Bar, was anything purchased there to drink?
A Yes, sir.

Q What was purchased?
A I believe two fifths of whiskey and a six-pack. I am not sure.

Q A six-pack of what?
A Beer.

Q You left the Crossroads Bar and where were you sitting in the panel truck?
A In the back.

Q Where was the defendant John Luke sitting?
A In the back.

Q Did you see John Luke have anything to drink?
A I believe he did; everybody was drinking.

Q Everybody in the back was drinking?
A Yes, sir.

Q Was the bottle being passed around?
A Yes, sir.

Q Both fifths?
A Yes, sir.

Q And they were drinking the six-pack of beer?
A Yes, sir.

Q Did you see any gun in that truck that night?
A I heard a boy make a statement that he had one, one of the boys that was in the back of the truck, but I didn't actually see it.

Q Who was it you heard make a statement he had a gun?
A Roy Griffin.

Q You didn't hear John Luke say he had any weapon, did you?
A No, sir.

Q Did you ever see any weapon in his hands at all that night?
A No, sir.

Q Mr. Gallagher, when you got to this labor camp, what did you see happen there?
A Well, when we got to the labor camp, some of the guys got out of the front of the truck. It was Jimmy Purkhiser and several other people at the time, I didn't know

who they were, they was in the front of the truck. I know Jim got out and a couple of more guys got out, but right then, I didn't know who they was.

Q You saw Purkhiser get out of the truck?

A Yes, sir.

Q Did you see where he went?

A He went around to the front of the truck and over towards the house. At the time, I didn't know which house.

Q You saw somebody else get out of the front of the truck?

A Yes, sir.

Q Did you recognize who that was?

A Not right offhand. I knew who it was, I found out later, in the next few minutes, but at that particular time, I didn't know exactly.

* * *

DIRECT EXAMINATION (Continued)

BY MR. IVES:

Q Mr. Gallagher, going back now to the time you were stopped there at the labor camp, who did you see get out of the truck first?

A I saw Jimmy Purkhiser and several other people, but, you know, at that time I didn't know because I was in the back and they was in the front.

Q After Jimmy and several other people got out of the truck, did you see anybody else get out of the truck a second or two later?

A Yes, sir.

Q Who?

A Ray Stidham.

Q Now, then, could you tell us how many people were in the back of the truck?

A Approximately 13. Twelve or 13. I don't know.

Q Would you tell us approximately where the defendant John Luke was sitting?

A Actually, it is hard to say. He was in the back of the truck, but, you know, like you would get uncomfortable in one position and move to the sides of the truck and get tired leaning against the sides and move to the middle, you know. But at one time, in the back of the truck, he was within three or four feet of me, you know. He moved, or I moved. I had no reason at that time to know where he was exactly all the time.

Q Did you know John Luke prior to this time?

A Yes, sir.

Q How long have you known him, approximately?

A I would say five or six months.

Q Now, then, you say you saw John Luke consume some alcoholic beverages. Have you seen people when they were intoxicated?

A Yes, sir.

Q How old are you, Mr. Gallagher?
A I will be 23 the 8th of July.

Q Have you seen very many people under the influence of intoxicants?
A Yes, sir.

Q Would you describe his condition with regard to sobriety that night?
A Well, he was —

MR. GLICKSTEIN: Your Honor, the State objects.

THE COURT: Objection overruled.

A He was talking quite a bit and acting like — well, it is hard to describe. You have to see somebody drunk. He was talking and not making too much sense. He was nervous and, you know, just drunk. I mean, it is hard to describe exactly. I don't know how to express myself.

Q You would say he was intoxicated?
A Yes, sir, I would.

Q Do you know whether he had anything on his head that night?
A Yes, sir, he had a hat.

Q He had a hat?
A Yes, sir.

Q Could you tell us what kind of a hat he had on?
A Well, it is what is commonly known as a Harley-Davidson hat, made by the Harley-Davidson Motorcycle

Company. It is small, about this big (indicating), with a bill or — some people don't wear them with a bill, they wear them without a bill.

Q Did you get out of the truck?

A Yes, sir, I got out of the back of the truck after the shooting started. We all got out of the truck then.

Q After the shooting started?

A Yes, sir.

Q What was said, if anything?

A The whole thing was — I don't know exactly what had happened.

Q You didn't know what had happened?

A Yes, sir.

Q Everybody piled out of the truck?

A Yes, sir. Almost everybody. There was a couple of people stayed in the truck. Almost everybody got out.

Q Now, then, did you see John Luke get out?

A Yes, sir, he was out. There was a crowd of us in the back of the truck and he was there in the crowd. I noticed he was there.

Q About how far would you say he got from the truck?

A None of us got more than ten or 12 feet out of the truck.

Q Did John Luke at any time to your knowledge ever get up on the porch of the house?

A No, sir, he did not.

Q Did you see anybody up in that direction?
A Yes, sir, I saw three people up there.

Q You saw three people?
A Yes, sir.

Q Up towards the house.
A Yes, sir.

Q Was John Luke any one of those three people?
A No, sir, he wasn't.

Q Are you positive that he never got up to the house?
A Yes, sir.

Q And you are positive that he had a cap on, a Harley cap?
A Yes, sir.

Q Now, then, did you see any weapon in John Luke's hand?
A No, sir, I did not.

Q Did you at any time hear John Luke threaten anybody?
A No, sir, I did not.

Q Did you at any time see or observe John Luke aid, abet, encourage or procure James Purkhiser to shoot anybody?
A No, sir, I did not.

Q Never did. Are you related to John Luke by blood or marriage?
A No, sir.

Q Do you have any interest in the outcome of this event at all, as far as John Luke is concerned?

A No, sir.

Q It is not going to mean anything to you one way or the other, is it, Mr. Gallagher?

A No, sir.

Q Were you subpoenaed to come over here?

A Yes, sir, I was.

Q Were you brought from the jail in Orlando and brought over here?

A Yes, sir.

Q Let me ask you this, do you know whether John Luke had on any glasses or not?

A Well, he wore prescription sun glasses all the time.

Q All the time?

A And I imagine he did. I mean, right offhand, I don't exactly remember, but I have never seen him without them.

Q Not without prescription sun glasses?

A Yes, sir.

Q As a matter of fact, he had a nickname, didn't he?

A Sir?

Q He had a nickname, didn't he?

A Yes, sir.

Q What did they call him?
A Shades.

Q Was that on account of these glasses?
A Yes, sir.

* * *

HUBERT RAY STIDHAM,

Defendant herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STAHL:

Q Would you please state your name?
A Hubert Ray Stidham.

Q Would you please tell us where you have been living since December, 1965?
A In the Broward County and the Fort Pierce jail, sir.

Q When were you arrested?
A December 7th, about 10:30 at night.

Q And you are one of the defendants in this case charged?
A Yes, sir.

Q Now, on the evening of December 5, 1965, did anybody come to your home?
A Yes, sir. James Purkhiser came by.

Q Anybody else?

A Yes, sir. There was some more boys in the truck but at the time I didn't know who they were.

Q Who did you live in this house with?

A My wife and baby.

Q How old is your baby?

A Two years old.

Q Was anybody there that evening when Purkhiser came to the house?

A I am not sure at the exact time he came. I was asleep; he woke me up.

Q Was anybody there when you had a conversation with Purkhiser?

A Jim Gallagher was present.

Q Will you please tell us what this conversation was that you had with Purkhiser there in your house on the evening of December 5, 1965?

A Well, I was asleep in the bedroom to the back of the house and I heard somebody calling me and by the time I got awake, why, my wife had told Jimmy that I was in the other bedroom and —

MR. GLICKSTEIN: If it please the Court, the State objects to all of this conversation as hearsay.

MR. STAHL: Your Honor, in this case, my man is charged with aiding and abetting and counseling, and I certainly think in one of these cases where you have got a principal and —

THE COURT: Objection overruled.

Q Go ahead.

A And Jimmy came in and I raised up off the bed and he said I been messed up, buddy, and I said what happened, and he said Chuck and I were coming down the road up above Margate and this guy ran me off the road in a new Chevrolet and I started up beside him and he slammed the brakes on and I had to leave the road again. He said — I am not sure; I was about asleep — I think he said there were two or three guys in there. He said they thought it was a big joke. They were looking back and laughing. He said the light at Margate caught him and I had a couple of words with him and he cussed me and I hit him and —

MR. GLICKSTEIN: If it please the Court, the State renews its objection. Your Honor has sustained all objections heretofore as to any conversations between Purkhiser and Miguel Rivera and now, your Honor, the State submits under the same rules, that the same rules pertain to this alleged conversation as being heaesay.

MR. STAHL: This testimony will show if he is any way aided, abetted, counseled or encouraged a homicide.

THE COURT: Well, I think he can, but I don't want him to go into the statements again beyond what he knows. We are getting into third degree statements. Continue. I am going to permit you as much leeway as I can.

Q Go ahead.

A So, we walked out into the living room of my house and she had a cup of coffee and I asked her if she

would make me one and Jimmy said look at my head, and the back of his head was bloody and had two knots on it. and his pants were tore down in the front. So, he said he had been in a fight and a bunch of guys ganged up on him and hit him in the head with a stick or ball bat or something, I don't remember exactly what he said, and his head was swollen up and the scalp was lacerated. So, he said they had beat him up and Chuck Smith, too, and they had run them off and I said, why didn't you call the law and he said I did. I said, well, did they put them in jail, and he said, no, they let me up when the officer got there, and he said the officer told me — told Chuck and I to get out of there or we would all get killed, that there were too many of them, that he couldn't do nothing at the present, to just get on out of there, there hadn't been too much damage done. Jimmy said his motor was sitting towards the store and he had to go up between a car and the store to get room to turn around and he said as he went up to turn around, the officer pulled out and as he pulled out, a guy come running up and knocked him off the motor with a stick.

MR. GLICKSTEIN: If it please the Court, what may be material even as to the argument of the defense as to what is aiding and abetting would be with respect to what is going to be done, not what took place as to third parties. I submit it is all hearsay.

THE COURT: Objection overruled.

Q Go ahead.

A So, he said that they grabbed him and hit him in the head again and shoved him up against a car and jogged him in the lower part of his stomach with a wooden

bench and I said what did Chuck do, and he said he did the best he could, but he couldn't get up, they had him down over next to a car, kicking him. He said we are going back up there and he said do you want to go with us. I said, no, I don't want to get in no trouble. I said Christmas is coming and I started a new job and everything and my baby is about half sick, so I reckon I will just stay here. And he said, look, buddy, he said I am asking you to do me a favor and you won't get into any trouble. So, my wife walked up and said — she had been listening, and she said you are not going, are you, Ray, and I said I don't want to, and so Jimmy turned to my wife and he said, Kathy, I will give you my word that Ray is not going to get into any trouble, he is not even going to get into a fight, he is not going to be involved in any way. Kathy said why do you want him to go for, and he said I want a show of force, I got some more guys in the truck, I figure if I got a show of force, behind me, this guy's buddies won't get in and if they don't get in and my buddies don't get in, it will be a fair fist fight between the two of us. My wife laughed and said what if he got whipped again, and he said I am man enough to take a whipping, if the man whips me fair, but I think I have a right to fight him because they had a stick and ganged up on me. So, I finally consented to go with them and I said who is in the car and he said Chico and Adrian. He said it is Adrian's truck. I said who else and we walked on out to the truck and we got in. So, Gallagher got in the back and Jimmy told me to sit up in the front. So, we were sitting down the road from my house and Adrian said he wanted to get out and use the bathroom. He wanted to know where he was at. He was highly intoxicated, in my opinion, and when Adrian got out, I sat next to Chico and we all sat in the truck. I said where is this place at and

he said I can show you but I can't tell you. We were going up the road and somebody said did Stidham come with us, or Hatchet, and I said yeah. He said, you got a gun? I said what do we need a gun for, and Chico said, Ray's better than a gun. That is all was said on the way up there, except they kept passing some whiskey around.

Q Did you drink?

A No, sir, I don't drink no whiskey. It makes me sick, whiskey does. I drink beer, but not whiskey.

Q Did you drink any beer on the way up there?

A No, sir. Somebody offered me a can and I took a swallow of it and it was hot, so I passed it back.

Q You were sober?

A Yes, sir.

Q Tell us what happened? Firstly, was there any talk in that truck about going up there and killing the Puerto Ricans?

A No, sir.

Q Just a fight?

A Yes, sir.

Q Tell us what happened when you got up there to the labor camp?

A Well, you see, we didn't go to the labor camp. We didn't intend to go to start with. We went to a store where they sell beer at. That was where the fight took place. So, when we got there, the store was closed and so we pulled to another store and I was thirsty and went inside and got me a coke and come back out and a '64 Chevrolet, red

one, pulled up with a colored man in it and so somebody said give me some coke, so I hand them my coke and they poured whiskey in it, so I walked back inside to get me another coke and as I was going in, the colored man was coming out. So, when I came back out, him and Jimmy were talking to one another, and so I heard him tell Jimmy that he was the one that called the law that evening, that they were at another store down the road. So, Jimmy asked him do you know where the guy lives that I had the fight with, and he said no. He said I know where the guy lives that owns the store. He said when the store is closed, it is usually not closed this early at night, but when the store is closed, they hang out at a bar over on 810.

MR. GLICKSTEIN: Your Honor, it is impossible to make objections because there are no questions and answers.

THE COURT: Yes, but this is nothing more than relating the events of the night as to their valuableness; it is hard to say. He is just relating the events and, until he gets to a point where it really gets critical, this is the way the night unfolded, so let him tell his story.

A (Continuing) So, Jimmy says do you know where the guy lives and he said, no, but I know where the guy lives that owns the store. He said he can tell you where the bar is, I think it is over on 810. Jimmy says, anybody know where 810 is? I said it is overgoing into Deerfield Beach, and it is a long ways over there. So, the guy said that the guy that owned the store kept some stuff at his house, you know, like bread and stuff and he said people went in and out. He said you can go over there and ask where this place is. I am not sure they are over there, he

said, but they probably are. I have been over there with another guy, but I was pretty drunk at the time. So, Jimmy said you all follow us. So, everybody was drinking and it took them a while to get back into the truck and so we pulled onto Hammondsville Road and started back towards Margate. So, the only lights on Hammondsville Road turned to the left, so we went down and turned to the left and didn't see anything of a car, so we went around and went back up to the store again. So, the guys got out. A few minutes, Jimmy and the colored man came back and Jimmy got out and John Henry, Chico, was driving the truck, and he asked why he didn't follow him, what happened. So, Chico told him he had lost him. Chico was driving all over the road on the way up there. He ran off the pavement several —

MR. STAHL: Just a minute. Your Honor, I don't like to stop my witness, but I don't want to offer any testimony today in relation to John Henry.

THE COURT: Mr. Stahl, do you want this man to tell his story in his own words, or do you want me to let Mr. Glickstein —

MR. STAHL: I don't want to lose a closing argument because I don't intend to offer John Henry or any testimony in support of John Henry. That is all. I want the man to tell the whole thing, but I want to preserve closing argument.

THE COURT: All right.

Go ahead.

A It had taken Chico a little bit to get the truck cranked up and turned around. So, Jimmy told me, you drive the truck. So, the negro said, hey, man, come here a minute. He said are you sober? I said yeah. He said that guy is drinking and he wants to go over there and show him where the man lives that owns the store and that guy ain't home now but he wanted to go back and he said the guy might come home and I don't want him to think I had anything to do with it because it will cause retaliation on me from the Puerto Ricans. He said how about you just riding back over there with us and I will take you by and show you the house and then you all can go back in the truck. So, I said all right. So, we rode through there and he showed us a house and there were three or four cars in the road but the house was all dark, there was no lights on anywhere. So, we go back over to the store and got out and the colored man left. So, we stood there and talked a little bit and so I said — somebody said let's go back to LaBella's, there is no point going back over there. We had told the guys there was nobody home. So, somebody said let's go to LaBella's and get a beer. I said I got to work tomorrow, just drop me off at the house. We get in the truck and start down Hammondsville Road and Jimmy told Chico, turn right here. So, Chico turned over the bridge, started back into the labor camp. So, I told Chico to stop and he stopped and I asked him — told him there is nobody home. Jimmy said, I want to ride by there and make sure I know where the house is myself. He said if it takes me a month, I am going to come back and find out where this guy hangs out. I am going to see that he whips me fair. It makes me mad if somebody beats on me with a stick, especially if there is more than one. We told everybody to be quiet because we had no business being in there and if we met

a police officer, the nigger told us the police patrolled the place every fifteen minutes, and we figured if we got caught in there, we would go to jail, because by this time — two girls was in the truck drinking and you could tell by looking at them, neither one of them was old enough to drink. So, Jim said there is the house on the right. The house sits here and there was another road goes up through the project. So, I said there is nobody home, let's go, and he said, hold it a minute. Chico stopped and somebody said what is going on. He said nothing. So, I told Jimmy, the house is dark, there is nobody there, so let's go on and if you want to come back later and find out where the place is — so, about this time, a car door slammed, or a car pulled up, I couldn't see, it was back behind us. We were sitting this way and back behind us a car door slammed and Jimmy opened the door and looked out. He said, hey, there is a porch light on next door and there is some people over there, I think I will go over there and see—I couldn't understand—I can't swear to what he said. He said see if they were there, or see if they know where this place is, one, I can't say which. But he got out of the truck and — do you want me to use my exact words?

Q Go ahead.

A It had profanity in it. I said, no, damn it, don't go over there. I said, let's go. So, Jim walks besides the truck and he said he would be back in a minute. So, I started cussing to myself. I said some cruiser is going to come through here and every damn one of us is going to jail and Chico said, don't get hot, I will go get him and we will be on our way. Chico gets out the other door a couple of seconds after Jimmy left, a quarter of a minute,

I guess, so, Adrian is laying over on me passed out, and I can't get to my lighter and I had a cigar in my mouth that had gone out and I asked somebody to give me a match and it was either Bob Walker or Chuck Smith, I am not sure — it was pretty warm, especially with all the people in there, and they had opened the back doors to the truck and so it is dark and from where I was at I couldn't see the house because the doors on the truck weren't open all the way back, they were just ajar, you know. So, we heard some loud voices and I said what is going on, and I think it was Bob Walker — the only reason I think it was, I think I recognized his voice. It was dark and I couldn't tell, and he said Purkhiser is arguing with somebody. I said, Holy hell, don't let's none of the rest of these drunks out, let me go see if I can get these boys to come on before they get every damn one of us in jail. As I got out of the truck, a porch light over here had come on and we were down the road approximately the length of, I'd say, from here to the door back there from the driveway to the house, and as I walked back, two more porch lights come on. So, I turned down the driveway and I could see just a little of the guy standing at the door and I don't know what the conversation was before that. The first thing I heard was the man say, no, I don't know you, and Jimmy says, are you sure, and Jimmy was standing facing the guy, like the doorway was here and Jimmy was standing here, and Chico was standing with his back to me, and had his arm laying up on his shoulder with an ax in his hand and all I could see was about this much from here back of Jimmy's back, and a little bit of the other guy around Chico, just the front of his stomach.

Q Did you see a gun?
A No, sir.

Q Then what happened?

A So, Jimmy said are you real sure you don't know me and he said I am the guy that you people beat the hell out of and the guy said it wasn't me. He said I heard about the fight but I haven't been to the store in a week. About the same instant, or a little before, the porch light of the house next door came on and I told Jimmy, I said, hey, Purky, come on, let's get the hell out of here, you got no business here, and somebody will call the law and every one of us will go to jail. Everybody is drinking, let's get out of here. They didn't pay me no attention. I said, hey, Jimmy, can you hear me. And I am standing — I don't know, I imagine from here to the back row of the jury from the house. So, a guy next door opened the door, comes to the door about this time and I turned around and looked and as I looked that way, I heard a noise and the door slammed on the side of the place and three men — I mean, three women or girls run out. You could tell they weren't men because they had on dresses. And I said, hey, Jimmy, come on, the guy may be going after a gun or something, because this guy had said — hey, wait a minute — Jimmy or Chico, or somebody — it was in English — and they started talking Spanish and I started walking out the driveway and they are still standing by the door. And so, by the time I get up into the highway and I guess I was ten feet away from the truck, why, John Luke says, what is going on, Hatch, and I said, nothing, get in the truck. Luke had his hand on the back of the door and was standing there. He had Roy Griffin's cap on backwards. You could make out Luke because the cap was low in the front and high in the back and he had his glasses on. When Luke is drinking, you can hear him whispering for four blocks, and so he said, what is happening, and I said, nothing, get in the damn truck, let's

get ready to go. So, I walked, just about the time I got even with the back of the truck, about four or five shots went off and I started to run and I run up to the front of the truck and it dawned on me I had nowhere to run, so I jumped back inside the truck and maybe it seemed like I was a coward, but the first thing I thought of was bending over in the truck, if somebody got shot, it would be somebody in the back and not me. So, I got Adrian and straightened him up in the truck and I am leaning over and then I thought of Chico driving all over the road and, too, I didn't know who had got shot there. So, I slipped over and cranked the truck up. By the time I got under the wheel and got the truck cranked, Jimmy was running to get in the door on one side and Chico was in the back, and Chico ran up to the side of the truck to drive and I told him to get in the back, I will drive. So, as Chico was getting in the back, I don't know whether some of them hit the truck or what, but it scared me, I thought a bullet hit the truck. There were still guns going off. I started out at a pretty good rate of speed for the old truck and I was scared and I was mad, too, and I asked Jimmy, I said, who in the hell shot? He said, I did. I said, what the hell did you shoot for? He said, the guy shot at me. I said, did you kill anybody? He said, no, and I said did you hit anybody, and he said, I don't think so. I said, you don't think so, don't you know? He said, the guy shot at me and all I done, I fired between them to make them stay back. So Chico says — everybody's talking — and Chico says something about I wouldn't do this for all of my friends, or something like that, I like to have gotten my damn head blown off on account of Jimmy, he said, I thought that guy had you, if I hadn't of hollered, he'd have blew your brains out. I said, did the man have a gun, and he said, yeah, he had a gun, he walked away

from the door, he crouched down and pulled it out of his pocket and fired. We are going out the road and I said, you mean, you shot a gun in that man's house and he said, yeah. I said did you know you can get five or six years out of that? He said, for what? I said, for firing into a dwelling. He said, no, you can't. I said, I know a guy that got two years for shooting into a house nobody lived in, or he said he did. We are going down the road to a curve, before you get to the harness track, and meet a police car coming with the lights on, and that scared me all the more. We went on down the road and pulled off. Somebody said he had to relieve himself, and he walked away from the truck and I said, tell me again, Jimmy, what happened, and he told me he shot between the two guys, to make them stay back, so he and Chico could run. We are going down the road and everybody is talking loud again and they said something about taking me home and I said I will get home myself. So, I drove the truck down to LaBella's and was going to call my wife and have her come up and get me and a guy was backing out that lived over where I lived and I asked him about giving me a ride home and he said yeah and turned about half a block before my house and I walked in the house and my wife was in the kitchen and she said I didn't hear you pull up and I said I didn't come in the truck. She said did Jim have a fight and I told her what happened and she said, you mean the guy pulled a gun on Jimmy? I said I don't know, I am just telling you what Jimmy told me. She said did you have anything to do with it and I said, no, I didn't have a thing in the world to do with it. I was trying to get him to come home before any trouble started. She said what was he doing in the man's house, and I said I didn't know. I told her about

going to the store and finding out where this bar was. So, I went to sleep and she woke me up the next morning about 5:30 and said breakfast was ready and I was sleepy, I didn't go to sleep until about 1:30, so I drank a cup of coffee and went into the bathroom and washed and washed my little boy and she went in the kitchen to fix me some more coffee and I was combing my boy's hair in the living room and she said, come here quick, and there was a news broadcast on the TV about some guys had gone up to a labor camp and a little girl had got killed. All of a sudden, I wasn't hungry. I sat and drank the coffee and the more I thought about it, the more I wanted to find out about it. I didn't go to work. I went down to West Hollywood to see if anybody knew anything about it. When I got there, nobody knew anything more about it than I did. I picked up Gallagher and got the truck and towed it. A buddy of mine come by and brought a paper that evening and so I went home and bought a paper and read about it and still couldn't find out what had happened. I heard Jimmy got arrested. So, I went home, my wife was worried and tore up about it, and a buddy of mine says if I was you, I would take off for a while. I said for what? I haven't done anything. He said, well, they said over the radio more arrests would be made. And so, a boy worked with me said let's take off to North Florida. I said, no, if we run it will look like we had something to do with it, I will just stay here. What can they arrest us for. He said, being motorcycle riders and being along. I said that is no reason to get arrested. We went on and worked Tuesday. About 10:30 Tuesday night, the detectives came over to the house and by then I had got really scared. They asked me what I knew about it and I told them nothing. They asked if Purkhiser got a gun over at my house and I told them, no, that

I didn't have a gun. He said you got a gun of no kind, and I said I got a shotgun. He said, I mean a pistol. I said, no, sir. So, they asked me — I was just fixing to sit down to dinner, and we had company, and I asked them if they would mind leaving and coming back later, it was kind of embarrassing. They told me to go ahead and have my dinner. They asked me, they said, you understand we have got no search warrant, but do you care if we look through your house? I said, no, I don't care. They looked through the house and walked out the front door and closed the door. I could see them still standing there, but I went in the kitchen and got me some coffee and Detective Joe DeBlois come back in and asked me if I would mind going back downtown and answering some questions and I said am I under arrest? He said, no, just go down and answer a few questions for me. He said to go down to the courthouse. I said I will come down in my car. He said I will bring you back. I said if I am under arrest, tell me now and I will give my wife the keys to the truck so the boys can go to work in the morning. He said you are not under arrest. So, I went ahead and gave my wife what money I had in my pocket and the truck keys and stuff and got down there and he asked me if I wanted to make a statement. I told him I didn't know nothing, so there wouldn't be no point in making a statement. So, he said, well, we have got a statement to the effect that you was along in the truck, so you can consider yourself under arrest. I said what for and —

MR. GLICKSTEIN: If it please the Court, I don't know how far your Honor wishes to —

THE COURT: Objection sustained.

Q Did you have a gun that night?
A No, sir.

Q Did you give a gun to Jimmy Purkhiser?
A No, sir.

* * *

AFTERNOON SESSION

1:30 o'clock, p.m., Thursday, June 30, 1966.

(Whereupon, the jury returned to the Courtroom, the witness, Defendant Hubert Ray Stidham, resumed the witness stand, and testified further as follows:)

CROSS EXAMINATION

BY MR. IVES:

Q Mr. Stidham, just a few questions. Now, let me ask you this, did you have at your home on that evening, or did you own an deer rifle?

A Yes, sir.

Q Did you own a shotgun?
A Yes, sir. I have four or five rifles and three shotguns.

Q Now, did anyone ask you to take those rifles or shotguns along?
A Nothing was mentioned about a gun.

Q Nothing was mentioned about a gun?
A No, sir.

Q Now, then, are you related in any way, by blood or marriage, to John Luke?
A No, sir.

Q Were you ever in business with him or anything of the kind?
A He worked for me for a while.

Q About how long?
A Two or three months, I guess.

Q Now, then, on that occasion when you say you got up to this labor camp, who got out of the car first?
A James Purkhiser.

Q And then who got out next?
A Chico said he would go get him.

Q Then, after Chico went to get him, then did you get out next?
A They had opened the back door. I can't say as to whether anybody had stepped out at this time or not, because it was dark.

Q Did you get out of the truck then?
A Yes, sir.

Q Did you see anybody from the back of the truck up there on the porch?
A There was only two people at the porch.

Q Only two people at the porch, is that correct?
A Yes, sir.

Q And was any one of those people John Luke?
A No, sir.

Q Did you ever hear John Luke say he was going to kill anybody or threaten to kill anybody, anything of that kind?
A I never heard anybody say anything to that effect.

Q Did you ever hear him make any mention of any violence, or what he was going to do to anybody up there?
A No, sir. About the only thing I remember hearing him say on the way up there, was who had the bottle.

Q Who had the bottle? All right, sir. Now, then, could you tell me this, when you got out of the truck, did you see John Luke out of the truck?
A Not when I got out of the truck. He was standing by the back of the truck, holding the door, as I came back.

Q Was that after you had gone up to try to get these fellows away from the house?
A Yes, sir.

Q And you saw him leaning up against the truck?
A Yes, sir. He asked me what was happening.

Q Was that prior to the time a shot was fired?
A Just a couple of seconds before the shot was fired.

Q And then, about how many shots did you hear fired?

A Right to start off with, it sounded like four or five right together, and then there was one now and then continued until even after everybody was in the truck. It was still firing.

Q After everybody was in the truck, there was still some firing?

A There was staccato sounds. It sounded like firing. I can't say it was, but it sounded like it.

Q Could you give us an approximation of the number of shots?

A I would say somewheres between 12 and 20 shots, all told.

Q Did you hear anything hit the truck?

A Something hit the truck.

Q Were you in the front at the time?

A Yes, sir.

Q That you thought something hit the truck?

A I had just cranked the truck up.

MR. IVES: I believe that is all.

BY MR. GLICKSTEIN:

Q Mr. Stidham, have you ever been convicted of a crime?

A Yes, sir.

Q How many times?

A You are talking about misdemeanors or felonies?

Q Any of them. What is your total number of the crimes which you have convicted of?

A I don't know, sir. I have had several traffic tickets.

Q Is the total of all misdemeanors and felonies three or four?

A More than that.

Q More than that? Is it as many as ten?

A Possibly more than that.

Q Is it as many as 20?

A I imagine that many times.

Q Is it as many as 30?

A No, sir.

Q It is somewhere between 20 and 30? Is that right?

A I have no idea.

Q And how old are you, sir?

A Thirty-one.

Q All right. This Mohican haircut that the defendant Luke had, you are the one that gave it to him, are you not?

A Yes, sir.

Q Gave it to him about a day before this shooting, didn't you?

A He had had it about a week and a half.

Q But, you are the one that gave it to him, is that right?

A Yes, sir.

Q Let's talk about this truck. You are the one that drove that truck away from the house, aren't you?

A Yes, sir.

Q And you are the one that drove it all the way back from the labor camp to LaBella's Bar, back in West Hollywood, a distance of about 19 miles, isn't that true?

A Yes, sir.

Q Now, on the way back, you had everybody get out of the truck, didn't you?

A No, sir.

Q Well, you ordered everybody out of the truck because you thought you were being followed, didn't you?

A No, sir.

Q As a matter of fact, it is your testimony, you didn't even think you were being followed, at any time, is that correct?

A Yes, sir. There was a car behind us.

Q But, you didn't do anything about it?

A No, sir.

Q Didn't you say if that man behind us tries to pull up or pass us, I am going to open up on him?

A No, sir.

Q And you had a gun in your hand at the time, didn't you?

A I never had a gun in my hand.

Q Now, you say at the porch with an ax was the defendant John Henry, is that correct?

A He was standing on the porch, yes, sir.

Q And with a gun was James Purkhiser, is that right?

A I don't know whether James Purkhiser had a gun or not; I never saw it.

Q When he came back to the truck, you asked him, or you heard him say something about he didn't know whether he had shot somebody or not, didn't you?

A He said he hadn't killed nobody. I asked him, you didn't kill nobody, did you, and he said, hell, no. I said, did you shoot anybody, and he said, no, I don't think so.

Q Well—

MR. STAHL: Your Honor, I object to the loud, argumentative manner in which he is asking the questions. The man hasn't shown he is a bit hostile in answering his questions and I don't see any need for such hostility on his part at this time.

THE COURT: Mr. Glickstein, please remember, there is a certain amount of decorum and conduct in the courtroom. Unless it gets to the point where I feel the witness is actually hostile, or appears to be, I would ask that you act accordingly.

BY MR. GLICKSTEIN:

Q Are you a friend of Purkhiser's?

A Yes, sir. I have know'd him for quite a number of years, but not that close.

Q Are you a friend of Luke's?

A I know him; he is an acquaintance.

Q Are you a friend of Henry's?

A I know him, too.

Q You have discussed your testimony with the defendant Luke?

A Not as to what I was going to testify to, no, sir.

Q That night in your home, you had a Super .38 Colt Commander, didn't you?

A No, sir.

Q That you had borrowed, a Super .38 Colt Commander, from a man by the name of George Arnold a couple of months before, hadn't you?

A I had never borrowed a gun from George Arnold, no, sir.

Q You had with you enroute to the labor camp that night, on December 5, 1965, a Super .38 Colt Commander automatic pistol, didn't you?

A No, sir.

Q And you know Mr. Arnold has left the State, don't you?

MR. STAHL: Your Honor, this is highly irregular and improper.

THE COURT: Make your objection.

MR. STAHL: For him to make such a statement and remark—

THE COURT: Objection sustained.

MR. STAHL: Will you ask the jury to disregard that statement that Mr. Glickstein made here in Court?

THE COURT: Well, the question was interrupted, so it never did reach the witness. Continue.

Q On the way back, when you were driving the truck to LaBella's, you told the people in that truck if they said anything, that there was going to be a funeral, either before you went to Raiford or after you got out, isn't that true?

A No, sir, I never said nothing to that effect. Why should I? I didn't have any intention of going to Raiford; I never done anything.

Q Is it your testimony you never threatened anybody at all in that truck that night?

A Yes, sir, that is my testimony.

Q You never made any threatening remarks to any of them?

A No, sir, there was no reason to make any threatening remarks.

Q You were at the scene, you were up at that labor camp on the night of December 5, 1965, weren't you?

A I was in the truck, yes, sir.

Q And you drove the truck away?

A Yes, sir.

Q And you told the officers afterwards that you were never there, didn't you?

A I didn't make any statement to the officers.

Q Didn't you, on interrogation by the detectives, tell these detectives that you had not been there that night, that you, in fact, had stayed at your home? Isn't that correct?

A Yes, sir, I said that.

Q And you expected them to believe it, didn't you?

A I was scared; I didn't know whether they would believe it or not.

Q You represented that was the truth at that time, didn't you, to these officers?

A I didn't sign no statement to it, sir.

Q Didn't you represent it to be the truth?

A (No response.)

Q Did you or didn't you represent to these officers that you were telling them the truth?

A I didn't swear to it.

* * *

JIMMY KEITH GALLAGHER,

recalled as a witness on behalf of the defendants, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. STAHL:

Q Are you the same James Keith Gallagher that testified before the noon recess?
A Yes, sir.

Q You were placed under oath at that time?
A Yes, sir.

Q Do you know the defendant, Hubert Ray Stidham?
A Yes, sir.

Q How long have you known him?
A I would say a year, 18 months, something like that.

Q Are you related to him?
A No, sir.

Q By blood or marriage?
A No, sir.

Q Do you have any interest in the outcome of Hubert Ray Stidham's trial here today?
A No, sir.

Q On the evening of December 5, 1965, did you see Stidham?

A Yes, sir.

Q Where?

A At his house in Fort Lauderdale.

Q Did anybody come to his house?

A Yes, sir.

Q Who?

A Jimmy Purkhiser came in the house. There were other people outside at this time and we didn't know it.

Q As best you can recall, will you tell us what the conversation was that you overheard between Purkhiser and Stidham?

MR. GLICKSTEIN: To which the State objects, your Honor. As I understand your ruling, you have sustained this objection.

MR. STAHL: Your Honor, may I be heard on this, please? This is a vital point in our case of corroborating the testimony —

MR. GLICKSTEIN: If counsel is going to argue, your Honor, I think the jury should be excused. I am anxious to get this thing along, too.

THE COURT: Excuse the jury.

(Whereupon, the jury withdrew from the courtroom

and the following proceedings were had out of the presence and hearing of the jury:)

MR. STAHL: Your Honor, we have a case here where my client is charged as a principal in the second degree, aiding, abetting, counseling or encouraging the commission of a homicide. Now, my client has taken the stand and testified to certain conversations he had with

Purkhiser, the principal in the first degree. Now, it is my understanding that both the State and the defendants have a right to have witnesses corroborate certain testimony. Now, a vital part of this case is if Stidham in any way encouraged, and how do you encourage? Only by word of mouth. That is one method. There are other methods. If you counsel, that has to be word of mouth. Aid and abet, that likewise can be by word of mouth. Now, it was permitted, and I don't feel it is objectionable, when he asked Gerry Fields the conversation or remark made in the automobile by Chico, John Henry, as they were driving along, that we have got Stidham and got Stidham's gun. Now, how can I start rebutting this testimony and this evidence if I am not permitted to have witnesses come forth to corroborate this testimony that has been given by my client? If that be true, my client's testimony just stands alone by itself with no corroboration and the jury can infer from that, well, if all those people were there in that truck and if Gallagher was there in that house and he didn't hear that conversation, what is wrong? Didn't that conversation take place? Now, this conversation in the truck, going up there, and what occurred just before Stidham went up to the house, is certainly of the greatest importance to my case. The remark made by Stidham as he got out of the truck to go to the house,

that shows what his intentions were in regard to the two men who were on the porch. He has testified that he said that. How can I prove whether he said that or not, unless we have people that were there present and testify as such. It is not a self-serving declaration at all. If that be true, that it is a self-serving declaration, well, any testimony Mr. Stidham would give as to the conversations he had would be self-serving declarations.

• • •

BY MR. STAHL:

Q Mr. Gallagher, will you tell me this conversation you overheard in Stidham's home between Purkhiser and Stidham as best you can recall?

A Well, me and Ray was at the house and Jimmy come up to the door and I didn't hear him pull up or nothing, the truck or nothing, and he come in and he was in pretty bad shape, he could barely walk, he looked like he had been beat up pretty bad, and I asked him what happened, you know, and he told me he had been up in Pompano and got beaten up—

Q Not what you and Purkhiser discussed, but tell us what Purkhiser and Stidham discussed.

A He was talking to both of us generally when he said this and he asked us, me and Ray — me and Mr. Stidham, both, that he would like to have us go along with him to make sure that he got a fair fight with this Puerto Rican and that a whole bunch of them didn't jump him again, like they did before, and we said, okay, just for that. All he told us he wanted, somebody to go along with

him for a fair fight, to make sure the same thing that had happened once didn't happen again.

Q And you went along?
A Yes, sir.

MR. STAHL: Can I go one step further?

THE COURT: So far, I will let it in. All right, go ahead.

BY MR. STAHL:

Q When you got in the truck, did you hear anybody say anything to Stidham about a gun?
A No, sir, I did not.

Q When you got to the labor camp there, in front, who got out of the truck first?
A Jimmy did.

Q Who next?
A I am not — at that time, I wasn't sure even who was in the front seat and I still don't know for a fact. I knew Ray was, but I didn't know who else.

Q What did Ray say while he was sitting in the front seat?
A He said something to the effect, I am going to go get them before they get in trouble, because what it was, they knew it was the wrong house and —

THE COURT: Don't go any further because I am not going to let any of that in about they knew it was the wrong house.

Q You heard Ray say what?

A Ray said he was going up to get them before they got in trouble. I don't think it was the exact words, but it was along this line.

* * *

Q Did you have any problem overhearing the remarks that he made?

A No, sir.

Q How long had it been since Stidham had gotten out of the truck and gone to the door of the house before Stidham got out of the truck?

A How long had it been before the rest of them left and he left?

Q Yes.

A Maybe 15, 20 seconds. You know. 30 seconds. I had no watch; I wasn't timing it.

Q Prior to Stidham getting out of the truck, did he make any remarks as to his intentions of leaving the truck?

A Yes, sir. He said he wanted to go up there and get them guys and bring them back before something happened, before they got into trouble.

* * *

BY MR. STAHL:

Q When you got to the labor camp, where were you in the truck?

A Where was I sitting?

Q Yes.

A About three-quarters of the way to the front of the truck, approximately I would say three feet from the cab itself, you know, the separate —

Q Where was Hubert Ray Stidham?

A Sitting in the cab.

DIRECT EXAMINATION (Continued)

BY MR. STAHL:

Q Mr. Gallagher, as best you can remember, will you tell us the conversation in Stidham's home between Stidham and Purkhiser on the night of December 5, 1965, when Purkhiser came to the house?

A Well, Jimmy — Purkhiser — came to the house, knocked on the door and he come inside the house in the living room and he was telling Stidham and me about what had happened, that he had been in a fight and a bunch of Puerto Ricans had beat up on him and another boy, and he asked us if we would go back up there with him to make sure the same thing didn't happen again, he was a little bit angry about it because a whole bunch of them had jumped on him. He wanted us go to along with him and make sure the whole bunch of them wouldn't do it again.

Q What did Purkhiser tell Stidham he was going back up there to do?

A To get a fair fight with the guy without all these other guys jumping on him, too.

Q Did you go and get in the panel truck?

A Yes, sir, I did.

Q On the way to the Pompano labor camp, where were you situated in the truck?

A Well, everybody was moving around a little bit because it was uncomfortable in the back of the truck, and I started out in the back —

Q How many were in the back of that panel truck?

A Approximately 13, 14.

Q All right. Now, were you so situated in that truck that you could overhear the conversations that were going on in the truck?

A Yes, sir; most of them.

Q Now, when you left Stidham's home, did you see Stidham get any gun or weapon?

A No, sir, I did not.

Q Did you see Stidham give Purkhiser a gun or a weapon?

A No, sir, I did not.

Q Did you see Purkhiser with a gun or weapon?

A After, when the shooting started up there, I saw Jimmy up on the porch and I — you know, it looked like he had a gun. He was a distance away from me. I couldn't exactly say it was a gun. It looked like it was a gun from a distance after the shooting had started, and we started getting out of the truck.

Q You didn't see Stidham give him that gun, did you, at any time?

A No, sir, I did not.

Q Did you hear any conversation in that truck on the trip up to the labor comp in regard to Stidham having a gun or they got Stidham's gun?

A No, sir, I did not.

Q When you got to the labor camp itself, will you please tell this Court and jury what occurred when you pulled up and stopped?

A Well, when we pulled up and stopped outside of this house and they started — Jimmy and some other people got out of the front of the cab and Stidham was sitting in the cab and he stayed in the cab at that time and Jimmy and them went up to the house and Stidham said I better go get them before they get in trouble, something to that effect, I don't remember the exact words.

Q Then what did Stidham do?

A He got out of the cab of the truck and started walking up towards the house.

Q Did you see whether he got to the house or not?

A Well, when the shooting started, we all jumped out of the truck to see what was going on, and at that time Ray was at the side of the house, Mr. Stidham, and he had not got to the house yet.

Q What happened after the shooting started?

A Everybody run and — back to the truck — and somebody said let's get out of here, or words to that effect, and we all jumped in the truck and started to pull away.

Q Could you overhear what Stidham had said when he got to the porch?

A No, sir, because at that time I was still in the truck, you know, and I couldn't — we was some distance away, not too far, but too far to hear ordinary conversation.

MR. STAHL: I have no further questions.

THE COURT: Any questions, Mr. Glickstein?

MR. GLICKSTEIN: I thought Mr. Ives and I had worked it out that Mr. Ives would cross and then I would cross following him.

MR. IVES: Mr. Glickstein, if I recall correctly, I called this young man as a witness first for John Luke and then, as I understand it, Mr. —

MR. GLICKSTEIN: Oh, yes, that's right.

MR. IVES: — Stahl called him as a witness for Stidham, so I have no right of cross examination.

MR. GLICKSTEIN: I see. In effect, he has testified for both defendants?

MR. IVES: Yes.

CROSS EXAMINATION

BY MR. GLICKSTEIN:

Q Mr. Gallagher, how old are you, sir?
A I will be 23 the 8th of July.

Q 22 years old?
A Yes, sir.

Q Have you ever been convicted of a crime?
A Yes, sir.

Q How many times?
A Twice.

Q You are a friend of Mr. Stidham's, aren't you?
A Yes, sir.

Q You are pretty good friends, too?
A Yes, sir.

Q You were living at his home, in fact, at the time that this shooting took place, weren't you?
A Yes, sir.

Q What happened to the Super .38 that he had in his house?
A I don't believe he had a Super .38 in his house.

Q Now, you will recall you were interrogated by Deputy Madole for the Broward County Sheriff's office on December 7, 1965?
A Yes, sir.

Q You represented to him at that time you were telling him the truth, didn't you?

MR. STAHL: Just a minute, now, your Honor, if he is going to use a statement for the purposes of im-

peachment, I would like to have an opportunity of examining that statement, please.

MR. GLICKSTEIN: There is no written statement as to this witness.

MR. STAHL: No written statement?

MR. GLICKSTEIN: No.

THE COURT: Continue.

Q You talked to Deputy Madole, didn't you?
A Yes, sir.

Q You told him you had never gone up there to that labor camp, didn't you?
A Yes, sir.

Q You gave him an elaborate story of how you had been working on something at Stidham's house with Stidham, didn't you?
A Yes, sir.

Q Now, as a matter of fact, you and Stidham had gone over that story very carefully before you ever were interrogated by Madole, didn't you?
A Not very carefully.

Q Well, you discussed it among each other, didn't you?
A Yes, sir.

Q You spent the night — the remainder of the night of December 5th discussing it, didn't you?

A No, sir, I did not.

Q You spent part of the night of December 5th and part of December 6th discussing it, didn't you?

A When I came home the night of December 5th, Stidham was in bed asleep. He wasn't even awake.

Q But, you wanted to make sure you told the same story when you spoke to Deputy Madole, didn't you?

A Yes, sir.

Q That story that you told, that wasn't true, was it?

A No, sir.

Q It was a complete fabrication on your part, right?

A Yes, sir.

Q That was a fabrication on your part and the part of Mr. Stidham, isn't that correct?

A Yes, sir.

Q Now, which, if any, of these people that were in that truck did you threaten, if they made any statement implicating you in this shooting?

A No one.

Q Not a soul?

A No, sir.

Q You have been in a cell with Geer and Walker?

A Yes, sir.

Q You have been discussing this case with them?
A Generally, yes, sir.

MR. GLICKSTEIN: No further questions.

HOWARD HOAK GEER,

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. IVES:

Q Would you state your full name, please?
A Howard Hoak Geer.

Q Mr. Geer, will you speak loud enough so these gentlemen in the jury box can hear you, please?
A Yes. sir.

Q Mr. Geer, were you with the defendants, or in a party where the defendants was present on the night of December 5th of last year?
A Yes, sir.

Q How many people were in this party?
A To my knowledge, it was 16.

Q Sixteen? All right, sir. Now, then, was that in one car or more than one car?
A It was in one vehicle.

Q What was the nature of the vehicle?
A It was a panel truck.

Q What was the reason for you being in the panel truck, as best you recall?
A My reason?

Q Yes, sir.
A To make sure that James Purkhiser didn't get jumped on by Puerto Ricans, like he had before.

Q Where did you see Purkhiser, or did you see him that night?
A I seen him at LaBella's Bar in West Hollywood.

Q Did he make any request of you or anybody else to go with him?
A He didn't make the request to me; it was voluntarily I went.

Q Just voluntarily?
A Yes, sir.

Q Did he say why he wanted to go up to this place?
A Yes, sir. He said that he wanted to fight this one Puerto Rican over because he had got jumped on, he was the one that started the trouble in the first place and he was going to fight him and he wanted to make sure he didn't get jumped on again, and I said, well, I will go with you.

Q Did he say anything about shooting the Puerto Rican?
A No, sir.

Q Say anything about hitting him?
A No, sir.

Q Say anything about hitting him with a crowbar or anything of that kind?
A No, sir.

MR. GLICKSTEIN: If it please the Court, all this testimony is between this witness and Purkhiser. Is that correct, counsel?

MR. IVES: That was in LaBella's Bar, where they were all present.

THE COURT: Objection overruled.

Q Now, then, did everybody get in the truck at LaBella's Bar?
A No, sir.

Q Where did some of the others get in, if you recall?
A They went to a town called Davie to a boy named Roy Griffin's house, and a couple of boys rode their motorcycles out there and they left them there and Roy got in the truck there and then we went to Ray Stidham's house and Ray and Gallagher got in the truck there.

Q Ray and Gallagher got in the truck there?
A Yes, sir.

Q Was John Luke in the truck at that time?
A Yes, sir.

Q You know John, don't you?
A Yes, sir.

Q Are you related to him by blood or marriage?
A No, sir.

Q Now, did you hear any statement in this truck on the way up to this labor camp where this shooting occurred, did you hear any statements in there about anybody having a gun?

A On the way up there, I knew Roy Griffin had a gun and that was all.

Q You knew Roy Griffin had a gun?
A Yes, sir.

Q Did you see the gun?
A Yes, sir. He was almost sitting next to me.

Q He was sitting next to you?
A That's right.

Q Is Roy Griffin the only person that you know that had a gun?
A Yes, sir.

Q Now, then, when you got up to this labor camp, do you know who got out of the truck?

A Well, I am not sure. They stopped at this store and this colored man was supposed to show them where this guy lived at and he left and James Purkhiser went with him and they came back and then we was supposed to follow them and they got lost and came back to the store again. I wasn't sure if Jimmy rode in the truck back

to the house or not — Purkhiser — When we finally did find the house, John Henry got out of the truck after Purkhiser was walking up through the yard. I looked out of the window and saw where he was going through the yard and he said I better go with him and after they got out, Ray Stidham said I better go get them, they are both drunk, and they will get into some kind of trouble and get hurt.

Q He said they were both drunk?
A Yes, sir.

Q Did Ray Stidham get out of the truck at that time?
A Yes, sir.

Q Did you get out of the truck?
A No, sir.

Q Did John Luke get out of the truck?
A I believe it is when the shooting started, they opened the back door — I don't know who said it — somebody said get out, and he stepped out and I couldn't see where he went once he got on the side of the truck.

Q It is your testimony, you don't think John Luke got out of the truck until there was some shots fired?
A No, sir, not to my knowledge.

Q How quick after the shots were fired did you see John Luke get out of the truck?
A Right when the shooting started, somebody yelled everybody out, and Paul Mahoney was holding the doors closed, they weren't locked or anything, he swung the doors

open and he started to get out and I was just getting ready to get out of the truck and everybody was starting to get back in, so I went up where I was.

Q You heard some shots?
A Yes, sir.

Q Could you give us an idea of how many shots altogether you heard?
A It was approximately ten — between ten and fourteen shots.

Q Did you hear any hit the truck?
A I thought they — one hit the truck, because I laid down on the floor. I thought it hit it, but I never seen any bullet holes in the truck.

Q You didn't know?
A No, sir.

Q This was at night, though, wasn't it?
A Yes, sir.

Q Now, at any time did you ever hear John Luke say he was going to commit any violence on anyone?
A No, sir.

Q Did you ever see him with a weapon?
A No, sir.

Q When he got out of the truck, what was he wearing on his head?
A He had what they call a motorcycle hat, a Harley cap.

Q Where did he get rid of that and when did he get rid of it?

A I don't remember when he got rid of it. I know he had got it off of Roy Griffin, but when he got rid of it, I don't know.

Q Did you go from there back to LaBella's Bar?

A No, sir. I went — Well, we stopped in the field and after we had stopped there, I went back and rode with Luke on his motorcycle from Davie back to LaBella's Bar.

Q You rode with Luke on his motorcycle from Davie back to LaBella's?

A Yes, sir.

Q Had he had an accident on his motorcycle at that time?

A No, sir. Later on that night.

Q Sir?

A Later on that night, he did.

Q Could you tell me if there was anything to drink in the back of that truck?

A Yes, sir, there was.

Q What did you see?

A Well, I myself had bought a fifth of Old Taylor whiskey and I don't know who bought the other one, but there was a fifth of Scotch and two or three six-packs of beer.

Q Did you see John Luke drinking some there in the back of the truck there that night?

A Yes, sir, he was. I had seen him with a beer.

Q Have you ever seen anybody under the influence of intoxicants to such an extent they were drunk?

A Yes, sir.

Q What could you tell us about his condition of sobriety that night?

A Well, he was pretty-well drunk; so was I. I guess everybody in the truck was.

Q You would say he was pretty-well drunk?

A Yes, sir.

Q Mr. Geer, were you charged with anything as a result of this trip up there that night?

MR. GLICKSTEIN: I object to the question as being immaterial. I think the Court has ruled on this.

THE COURT: Objection sustained.

MR. IVES: Your Honor, it seems to me I recall you said we could ask that question, whether they were convicted or not, and that is all, but we couldn't go into it.

MR. GLICKSTEIN: Your Honor, I think the ruling of the Court was clear that that question was improper and your Honor would not permit it to be asked.

THE COURT: Objection sustained.

MR. IVES: I have no further questions.

THE COURT: Proceed.

BY MR. STAHL:

Q Do you know Hubert Ray Stidham?
A Yes, sir.

Q Are you related to him by blood or marriage?
A No, sir.

Q How long have you known him?
A Since about last September.

Q Are you presently in jail?
A Yes, sir.

Q How long have you been in jail?
A Well, I was out on bond for approximately a month and a half. About five and a half months I have been in jail.

Q Now, did you see Hubert Ray Stidham the night of December 5, 1965?
A Yes, sir.

Q Where did you see him?
A At his house when he got into the truck.

Q Where did he get when he got into the truck?
A He sit in the front going up there, he was sitting in the front seat.

Q Where were you seated on the way up to the labor camp?
A I was in the back part of the truck, between the

divider, there was a wire divider, and I was sitting up against the wire.

Q Were you in such a position you could hear conversations that took place in that truck between some of the people?

A Yes, sir.

Q Was James Purkhiser also in that truck at that time on that trip up to the labor camp?

A Yes, sir.

Q While you were driving along in that truck, when Purkhiser was in the truck, Stidham was in the truck, did you hear any conversations at all between Stidham and anybody else in that truck?

A No, just that I handed him a bottle of Old Taylor up front, but I didn't hear him say anything to anybody else, just asked if somebody wanted a drink.

Q Did you hear any conversations in that truck on the way up there pertaining to Stidham having a gun?

A I am not positive who asked; I heard — Somebody asked.

Q What did somebody ask?

A They says, Ray, did you bring your gun, and he said, no, what for, what would I want it for.

Q Do you know if Stidham had a gun?

A Not to my knowledge.

Q Did Stidham have a gun that night that you know of?

A No, sir.

Q Did you see Stidham give a gun to Purkhiser that night?

A No, sir.

Q When you got there to the labor camp and parked out front, when did Stidham get out of the truck?

A After John Henry and Purkhiser got out of the truck, he said he was going to go get them before they got in trouble and that is when he got out.

Q Did you hear Stidham at any time counsel or instruct or say anything to Purkhiser to get him to go up there and kill any Puerto Ricans?

A No, sir.

Q Was there any conversation in that truck on the way to the labor camp where Stidham was present, concerning the killing of any Puerto Ricans by anybody in the truck?

A No, sir.

Q Going up there to have a fight?

A Yes, sir.

MR. STAHL: You may inquire.

MR. IVES: May I ask him one other question before cross?

THE COURT: Yes, sir.

BY MR. IVES:

Q Do you recall whether John Luke had on any glasses that night or not?

A Yes, sir; he always wears glasses.

Q Tell the jury what kind of glasses they are?

A They are tinted glasses.

Q Now, then, does he have a nickname?

A Yes, sir.

Q What do they call him?

A Shades.

Q Why do they call him Shades?

A Because his glasses were tinted color.

MR. IVES: I have no further questions.

CROSS EXAMINATION

BY MR. GLICKSTEIN:

Q How old are you, Mr. Geer?

A Twenty-one.

Q On December 5th, that evening, before you went up in the truck to the labor camp, you were over at an apartment at Pierce Street, is that correct?

A Yes, sir.

Q And the defendant Luke came up to you and talked to you?

A No, sir. Gerry Fields was the only one I talked to. I didn't say nothing to Luke.

Q Your testimony is that Luke didn't come up to you and say that two of the boys in the Club were starting a fight and one of them was supposed to be hurt? Didn't Luke come up and tell you that?

A No, sir.

Q All right. Do you recall talking to Deputy Kaiser of the Broward County Sheriff's office on December 23?

A Yes, sir.

Q Do you recall telling him that at that time?

A I don't remember saying that, no. It was—

Q When you left LaBella's, before Purkhiser ever went to Stidham's house, you never saw Purkhiser with a gun, did you?

A No, sir.

Q Then, up at the labor camp, when you got to the labor camp, you saw Purkhiser with a gun, didn't you?

A After he got back in the truck.

Q And it was an automatic, wasn't it?

A I believe so. I don't know that much about pistols.

Q An automatic pistol, correct?

A I don't know if it was automatic or not, I don't know.

Q You believe it was automatic, isn't that what you just testified to?

A I said he had a pistol. I don't know if it was automatic or not.

Q Do you recall telling Deputy Kaiser on December 23, which was only 18 days after this shooting, that you believed it was an automatic?

A I may have said it then, I don't know.

Q If you said it, it would have been true?

A I don't know at that time; I wasn't testifying or anything.

Q You don't know it it would have been true or not?

A No, sir.

Q Who drove away from that little house where the shooting took place?

A Ray Stidham.

Q And as he was driving away on the way back to LaBella's, he said that you all were being followed, didn't he?

A He said there was a vehicle following us, yes.

Q So, he pulled off the road, right?

A Yes, sir.

Q Told everybody to get out of the truck?

A He didn't tell — We got out, —

Q Everybody got out of the truck?

A There was a couple stayed in, and —

Q Well —

MR. STAHL: Let him answer the questions, please.

THE COURT: Give him an opportunity to answer your questions, Mr. Glickstein.

MR. STAHL: Will you let him answer that question about if he told him about getting out of the truck? He cut him off right at the end.

BY MR. GLICKSTEIN:

Q Answer it again, so there is no question about it. Everybody got out of the truck?

A There was a couple people stayed in. I am not sure who.

MR. STAHL: Mr. Glickstein, the Judge said to let him answer the question again. Will you let him answer the question again?

MR. GLICKSTEIN: What does the Court wish in this regard?

THE COURT: Apparently, there was some confusion about whether or not the witness answered the question as to whether Mr. Stidham ordered him out of the truck. Mr. Witness, do you recall being asked that question?

THE WITNESS: No, sir; he did not.

THE COURT: Ask him the question over and that will clear this testimony.

BY MR. GLICKSTEIN:

Q You say Stidham did not order you out of the truck?

A No, sir.

Q Are you afraid of Stidham?

A No, sir.

Q Not at all?

A No, sir.

Q Did he ever threaten you?

A No, sir.

Q He didn't threaten you even on that night?

A No, sir.

MR. GLICKSTEIN: No further questions. — Wait, I have one more.

Q Did you work for Stidham?

A One day.

* * *

ROBERT JAMES WALKER

BY MR. STAHL:

Q Mr. Walker, do you know Hubert Ray Stidham?

A Yes, I do.

Q How long have you known him?

A Well, prior to December 5th, I knew him about two weeks.

Q Two weeks?

A Yes, sir.

Q Were you just a casual acquaintance?

A More or less, yes.

Q You are not related to him by blood or marriage, are you?

A No, sir.

Q You don't have any interest in the outcome of his trial here today, do you?

A No, sir, just that I would like to see justice done.

Q Now, where do you live?

A Right now?

Q Yes.

A In the St. Lucie County jail.

Q How long have you been living in the St. Lucie County jail?

A Since Monday of this week.

Q And before that, where did you live?

MR. GLICKSTEIN: If it please the court, the State objects. It is an indirect way of doing what the Court has prohibited directly.

THE COURT: Read back the question.

(Question read)

THE COURT: What is the purpose of it?

MR. STAHL: I will withdraw that question and ask this question then.

Q Did you go in that truck to that labor camp that night with Stidham and Purkhiser?

A Well, he wasn't there when we first left.

Q When you got there to the labor camp, were you in the truck that went there that Stidham and Purkhiser were in?

A Yes, I was.

Q As a result of your having gone to that labor camp that night in that truck, were you charged with the offense of murder in the first degree?

MR. GLICKSTEIN: I object to the question, your Honor. I think your Honor has ruled on this several times.

THE COURT: Objection sustained.

Q On the way to the labor camp in the truck, did you hear any conversation between Mr. Stidham and anybody that was in that truck when James Purkhiser was present in the truck?

A Well, there was quite a bit of conversation in the truck.

Q What was the conversation you heard in regard to Stidham?

A In regard to Stidham? Just after we stopped at his house and picked him and another boy up, why, he was in the truck, somebody said something about Ray, do you have a gun, and he says, no, why should I, or what for.

Q Did you see Stidham with a gun?

A No, I didn't.

Q Did you see Purkhiser with a gun?

A No, I haven't.

Q Did you see anybody with a gun in the truck on the way up there that evening.

A Not on the way up, no.

Q After the shooting occurred, did you see Stidham with a gun?

A No.

Q At any time did you see Stidham give Purkhiser a gun?

A No, sir, I didn't.

Q Who got out of the truck first?

A First?

Q Yes.

A I believe John Henry got out of the truck first.

Q Now, did you see Purkhiser going to the house?

A From where we were in the truck in the back, it was closed in, we couldn't see out.

Q Now, when Stidham got out of the truck, did he say anything?

A Right prior to getting out, he said I am going up and get those two drunk so and soes and get them back here before they start any trouble, or before they get us in some trouble, rather.

Q Did you see Stidham go towards the house?

A I couldn't see once he got out of the truck, I couldn't see no more.

MR. STAHL: All right, you may inquire.

CROSS EXAMINATION

BY MR. GLICKSTEIN:

Q Mr. Walker, you will recall on December 15, 1965, only ten days after the shooting of this little girl, you were interrogated by Deputy Madole of the Broward County Sheriff's office, weren't you?

A Probably; I was interrogated by about five of them.

Q Well, sir, you were interrogated as to your activities on the night of December 5, 1965, isn't that true?

A They asked me questions, yes.

Q And you told him or them that you were bombed that night, drunk, on December 5, 1965, isn't that correct?

A I said about between midnight and about 2:30 I was, yes.

Q You said that you didn't know when or how or

who the individuals were that went to the Pompano area?

A No, sir, I didn't say that.

Q You didn't say that?

A No, sir, I did not.

Q You also said at that time that you didn't know what happened after they arrived?

A No, sir, I never said that.

MR. GLICKSTEIN: I have no further questions.

* * *

PAUL JAMES MAHONEY

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STAHL:

Q Will you please state your name?

A Paul James Mahoney.

MR. STAHL: Will you please approach the bench, Mr. Glickstein?

(Discussion out of hearing of jury.)

Q Mr. Mahoney, where are you presently living?

A 2764 Southwest 27th Street, Fort Lauderdale.

Q Now, do you know Hubert Ray Stidham?

A Yes, sir, I do.

Q How long have you known him?
A About a year.

Q And is he related to you by blood or marriage?
A No, sir.

Q Have you any interest in the outcome of this trial as it involves Hubert Ray Stidham?
A I would like to see justice done, that is all.

Q Now, on the evening of December 5, 1965, did you see Hubert Ray Stidham?
A Yes.

Q Where did you see him?
A In a truck.

Q Were you in that truck?
A Yes, sir.

Q Where were you in the truck?
A In the back.

Q Where was Mr. Stidham in the truck?
A In the front.

Q Where were you going?
A We were going to the migrant laborer's camp in Pompano Beach.

Q Why were you going up there?

MR. GLICKSTEIN: If it please the Court, I object to why he was going up there as having no materiality and calls for his conclusion as well.

THE COURT: Objection overruled.

Q Go ahead.

A We were going there, or I was going there to be sure that James Purkhiser would not be attacked again.

Q Now, tell me this, was there any conversations in the truck when Ray Stidham was there by any — How many people were in the truck, first?

A 17 or 18, I believe.

Q In that truck, 17 or 18 people. When Ray Stidham was in there, was there ever any conversation pertaining to the effect that you were going to the labor camp so that somebody was going to kill some Puerto Ricans?

A I didn't hear any, if there was; otherwise, I would have gotten out.

Q Was there any conversation in that truck on the way to that labor camp when Stidham was in there concerning Stidham having a gun, that you heard?

A Not that I heard.

Q Did you see Hubert Ray Stidham with a gun?

A No, I did not.

Q Did you see James Purkhiser with a gun?

A No, I didn't.

Q Did you see a gun in the truck or hear conversation concerning a gun in the truck?

A I saw a gun in the back of the truck.

Q Who had it?
A Roy Griffin.

Q Is that the only gun you saw on the way to the labor camp?
A Yes.

Q After the shooting, did you see a gun?
A I didn't see any guns after that.

Q When you got to the labor camp and to the house, what occurred?
A Oh, I think James Purkhiser got out of the truck and I think one or two others. Being dark and a lot of confusion, I can't say exactly who.

Q What did Ray Stidham do?
A I don't know what he did. I don't remember seeing him anywhere.

Q Did you see Ray Stidham up on the porch of that Puerto Rican migrant laborer's house?
A No, sir, I did not.

MR. STAHL: You may inquire.

CROSS EXAMINATION

BY MR. GLICKSTEIN:

Q Did you see anybody up at the porch?
A No, I didn't, because I couldn't see that far in the dark.

• • •

CHARLES KENNETH SMITH,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STAHL:

Q State your name.
A Charles Kenneth Smith.

Q Where do you live at the present time?
A 2219 Northeast 17th Avenue in Fort Lauderdale.

Q Are you an elected — are you a qualified — strike that. On December 5, 1965, did you see Hubert Ray Stidham?
A Yes, sir.

Q Where did you see him?
A I believe the first time I saw him he was sitting in the front seat of the truck.

Q Were you in the truck?
A Yes, sir.

Q Was James Purkhiser in that truck, also.
A Yes, sir.

Q How many people were in that truck?
A I believe, all told, there was — I don't know, 16 or 17, I believe.

Q Where were you going?
A Apparently, up to Hammondsville Road.

Q Had you been up there earlier that day?
A Yes, sir.

Q Had you been with James Purkhiser that day?
A Yes, sir.

Q Had you met Miguel Rivera that day?
A Well, not physically, but I met him.

Q Did anything happen to you as a result of meeting Rivera that day?

MR. GLICKSTEIN: If it please the Court, the State objects. Anything that took place between the witness and Miguel Rivera has no materiality to this episode whatever.

THE COURT: Objection overruled.

Q Answer the question.
A I was severely beaten.

Q Now, on the way back up to this labor camp with the 16 people, or whatever it was that you mentioned, did you hear any conversation in that truck when Hubert Ray Stidham was present concerning Stidham's having a gun?
A No, sir.

Q Did you know of a gun being in the truck?
A No, sir.

Q Did you see Stidham with a gun?
A No, sir.

Q Did you see Purkhiser with a gun?
A No, sir.

Q Do you know of your own knowledge who Purkhiser got the gun from?
A No, sir.

Q Did you see Hubert Ray Stidham on the front porch of the house?
A I couldn't even see the front porch.

Q From where you were?
A From where I was.

Q Did you ever get out of the truck?
A No, sir.

Q At the present time, are you a duly qualified registered voter in Broward County, Florida?
A Yes, sir.

MR. STAHL: You may examine.

CROSS EXAMINATION

BY MR. GLICKSTEIN:

Q Mr. Smith, how old are you, sir?
A Twenty-three.

Q After this shooting incident on December 5, 1963, the defendant Stidham made this statement, didn't he, that if he were sent back to Raiford, or had to go back to Raiford, or had to go back, there would be a funeral before he was sent, or as soon as he got out?

A (No response.)

MR. STAHL: Your Honor, I want to make a motion, please, at this time.

THE COURT: Excuse the jury.

(Whereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury:)

MR. STAHL: At this time, on behalf of the

* * *

BY MR. GLICKSTEIN:

Q Did Mr. Stidham make the statement, after the shooting, if he was sent back to Raiford, or had to go back, there would be a funeral before he went or as soon as he got out.

CROSS EXAMINATION (Continued)

BY MR. GLICKSTEIN:

Q I asked you that question, Mr. Smith, of course, with the understanding that the year would be 1965, not

1963. Did the defendant Stidham make this statement following the shooting?

A There was a length of time after he made a statement with words to that effect.

Q He did?

A (Witness indicated affirmative response.)

Q After the shooting, from the time the truck sped away from the house, after the shots, until you got out of the labor camp, Purkhiser said I was shooting, or words to that effect, didn't he?

A Yes, sir.

Q And Stidham asked Roy Griffin to put Griffin's gun into Stidham's hands, didn't he?

A He asked if there was any guns in the truck and Roy said I have got one, and Ray said let me see it, or something like that, and Roy said you can see it but that is all.

Q Stidham asked actually—asked Griffin to put it in his, Stidham's, hand, didn't he?

A I don't remember exactly the whole conversation that went on about it, but the important part is that Roy said you can see it, but that is all, and he held it up.

Q And you and the others went back up there for revenge, didn't you?

A I wouldn't say revenge, no.

Q Do you recall being asked by Deputy Madole on December 8th this question, "This was for revenge?"

and you gave this answer, "Well, that is a nasty word, but I guess that would be it. I can't think of any other way of saying it." Wasn't that the question asked you at that time and wasn't that the answer you gave?

A Yes.

Q Do you recall being asked at that time by Deputy Madole, "Who asked Roy to put the gun in his hand?" and the answer was—

MR. STAHL: Your Honor—

Q —"I think that was Stidham." Do you recall that question and that answer?

MR. STAHL: Your Honor, I don't know whether he is trying to use the statement for impeachment or for the purpose of interrogation. He can only use a prior statement for the purpose of impeachment, not in the manner that he is using it.

THE COURT: Objection sustained.

MR. GLICKSTEIN: No further questions.

REDIRECT EXAMINATION

BY MR. STAHL:

Q Now, by "revenge", did you mean to go back up there and Purkhiser would have a fair and square fight with this guy and the rest of you keeping everybody off?

A That was the major idea of the whole—

MR. GLICKSTEIN: If it please the Court, the witness has answered, but the State objects.

THE COURT: Objection overruled.

Q Go ahead.
A That was the reason of going up there in the first place.

Q For what?
A For Jimmy to fight Rivera by himself.

Q Now, when you were giving this statement to Wayne Madole, were you under oath?
A No, sir.

Q Now, every time you have appeared in any matters pertaining to this and raised your right hand to God to tell the truth, have you always told the truth?
A Yes, sir.

Q Even if it implicated you in this matter?
A Yes, sir.

MR. STAHL: That is all.

HUBERT RAY STIDHAM,

Defendant herein, recalled as a witness on his own behalf, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. STAHL:

Q You are the same Hubert Ray Stidham who testified in this matter earlier today?
A Yes, sir.

Q You are still under oath, you know?
A Yes, sir.

Q Have you ever been an inmate at the Raiford State Penitentiary in Florida?
A No, sir.

JAMES DALE PURKHISER,

called as a defense witness, being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. STAHL:

Q Will you please state your name?
A James Dale Purkhiser.

Q Are you one of the defendants in this case, charged with the crime of murder in the first degree?

MR. GLICKSTEIN: If it please the Court, the State objects to that question. There are three defendants on trial here today.

THE COURT: Overruled.

Q Answer the question.
A Yes, sir.

Q On December 5, 1965, were you in a truck that went to the Pompano Beach labor camp?
A Yes, sir, I was.

Q In that truck, was there the defendant Stidham and the defendant Henry?
A Yes, sir, there was.

Q When you arrived at the Pompano Beach labor camp, did you have a gun or pistol with you?
A No, sir, I didn't.

Q On the way to the Pompano Beach labor camp, did you tell any of the group in that you intended to go to the labor camp to kill someone?
A No, sir, I did not.

Q What were you going to the labor camp to do?
A To have a fair fistfight with Miguel Rivera.

Q When you got to the house occupied by the Flores family and got out of the truck, did you have a gun with you up until that time?
A I had the gun when I got out of the truck; somebody handed me the gun.

Q When you got out of the truck, someone handed you the gun?
A Yes, sir.

Q Do you know who handed the gun out of the truck?

A No, sir, I don't remember; it was dark.

Q The person that handed you the gun, did they say anything to you?

A No, just said you better take this, you might need it.

Q But, you don't know who that person was, do you?

A No, sir.

Q And how many people were there in that truck?

A There were a lot of them. I don't know.

Q As many as 15?

A Yes, sir.

Q Did you go to the door of the labor camp house?

A Yes, sir.

Q As the best you can remember, who was on the porch with you?

A The only one I can remember is Chico.

Q Did Chico do anything?

A No, sir, he didn't.

Q Where was Chico standing in relation to you when you were up on the porch?

A He was standing behind me.

Q On which side of you?

A Well, kind of behind me and on the left side of me.

Q Behind you on the left side?
A Yes, sir.

Q Do you recall how far in back of you he was?
A No, sir, I don't.

Q Where was the gun when you were standing there at the door?
A I had it in my hand.

Q Whereabouts?
A I had it on Navarro.

Q On Navarro?
A Yes, sir.

Q How far was Navarro from you?
A He was right up against the gun.

Q And how far was your body from Navarro?
A Oh, from here to here (indicating), I guess.

Q A short distance?
A Yes, sir.

Q A matter of a foot or two?
A Yes, sir.

Q From where you were standing and where you had the gun in Navarro's stomach and John Henry—Chico—behind you, could John Henry have seen the gun at that point?

MR. GLICKSTEIN: I object—

A No, sir, I don't think so.

MR. GLICKSTEIN: I object, it calls for a conclusion on the part of this witness.

THE COURT: Objection sustained.

BY MR. STAHL:

Q Now, what happened?

A From where—

Q You were standing there with the gun in Navarro's stomach?

A Yes, sir. Well, Flores come over from the bedroom door and I was talking to Navarro and he said what is going on. He said that to me in English. And then he said something else in Spanish to Navarro and then I think he saw the gun and, to me, he acted like he was going to go for it and I grabbed him and I shoved him backwards and I turned back to Navarro again and Chico said, "watch it, he has got a gun," and I looked and he was crouching down between the bedroom door and the living room, and I seen the gun and I seen the shot—I didn't hear it, but I saw the flame come out of the gun, and I just shot twice and we run.

Q And is that all Chico said, "Look out, he has got a gun?"

A Yes, sir.

Q Did anybody, did Stidham or Chico, counsel or encourage you to shoot that gun into that house?

A No, sir.

Q Did they in any way help you?
A No, sir.

Q And you didn't tell anybody you were going up there and shoot anybody, did you?
A No, sir, I didn't.

Q And, in fact, you never had an intention of shooting anybody?
A No, sir; none of us did.

Q And when you shot the gun, after you saw the flame from Flores' gun, did you aim at anything?
A I aimed over his head.

Q Over his head?
A Yes, sir.

Q Did you ever see the little girl?
A There wasn't no little girl in that house, sir.

Q The main fact is that Stidham and Henry had nothing to do with you shooting into that house?
A No, sir, they did not.

MR. STAHL: You may inquire.

MR. IVES: I have no questions, your Honor.

THE COURT: Any questions, Mr. Glickstein?

MR. GLICKSTEIN: Yes, sir, if you give me a minute to look over my notes.

MR. STAHL: If he is going to use—if he going to attempt to use any statements for impeachment purposes, I would like to be furnished a copy of the statement.

THE COURT: Let's wait and see what Mr. Glickstein does.

CROSS EXAMINATION

BY MR. GLICKSTEIN:

Q Mr. Purkhiser, have you ever been convicted of a crime?

A No, sir.

Q You have never been convicted of a crime?

A Never have.

Q Your testimony is that you are not the same James Purkhiser adjudged guilty—

A Oh, I didn't know you was talking about this. I thought you was talking about something else.

Q Have you been convicted of a crime?

A Yes, sir. Wrongfully, I might add.

Q This pistol that you used to do this shooting, Mr. Purkhiser, was an automatic, was it not?

A Yes, sir, I believe it was.

Q And the man closest to you as you got out of the truck was the defendant Stidham, is that correct?

A I don't remember.

Q Sir, if you will, try to remember, as you were driving to the house—

A I wasn't driving to the house, sir.

Q You do recall that the defendant Henry was driving the truck?

A Yes, sir.

Q You also recall, don't you, that you had the gun out and exposed the entire time from the time you took it into your hand until the time you did the shooting in the home of Tito Flores, isn't that correct?

A Yes, sir.

Q In plain sight, is that so?

A Yes, sir; it was dark, though.

Q At no time did you stuff it into your waistband or into your pocket?

A No, sir.

Q And you entered the home of Tito Flores that night, is that correct?

A Just on the threshold.

Q You had never seen this man in your life, had you?

A No, sir, I hadn't.

Q You had never seen Mr. Navarro in your life, had you?

A No, sir.

Q And you said, "Remember me?", is that correct?

MR. STAHL: Your Honor, again, I object to his decorum in this courtroom.

THE COURT: Objection sustained.

BY MR. GLICKSTEIN:

Q Is that correct, sir?

A Would you repeat the question?

Q That is what you said to Navarro, "Remember me?"

A Yes, sir.

Q Mr. Navarro had never laid eyes on you, had he?

A I don't know, sir.

Q You say the defendant Chico was right behind you?

A Yes, sir.

Q And he had an ax in his hand, didn't he?

A I never did see the ax; It is just what I found out later.

Q You later found out he had an ax in his hands?

A Yes, sir.

MR. GLICKSTEIN: No further questions.

REDIRECT EXAMINATION

BY MR. STAHL:

Q About that gun, you never got the gun until you had gotten out of the truck and was headed to the house, did you?

A That's right, sir.

MR. STAHL: That is all.

RECROSS EXAMINATION

BY MR. GLICKSTEIN:

Q Didn't you just testify a minute ago, on questioning by counsel, that, quote, "I had the gun when I got out of the truck?"

A I said when I got out of the truck, somebody gave me the gun.

Q At or about the time you got out of the truck, is that correct?

A When I got out of the truck.

Q The defendant Stidham had been in the truck?

A Yes, sir.

Q And he had been in the front?

A I believe so.

Q And you had been in the front?

A Yes, sir.

MR. GLICKSTEIN: No further questions.

REDIRECT EXAMINATION

BY MR. STAHL:

Q Now, did you get the gun from someone in the front or someone that had been in the back and got out?

A Well, there was a bunch of people milling around

at the time. Anybody from the front or the back could have given me the gun.

VERDICT

WE, the Jury, find the Defendant JOHN FRANCIS HENRY, a/k/a CHICO, guilty of Murder in the Third Degree.

SO SAY WE ALL.

DATED this 1st day of July, 1966.

CLIFFORD B. FREEMAN
Foreman

Filed in open court this the 1st day of July, 1966.

ROGER POITRAS, Clerk

By DANIEL B. DREYFUSS
Deputy Clerk

JUDGMENT AND SENTENCE

You, HUBERT RAY STIDHAM, having had a fair trial by a jury of your countrymen, and having been found guilty of the crime of Murder in the Third Degree, the Court now adjudges you to be guilty of that offense. What have you to say why the sentence of the law should not be pronounced upon you?

Saying nothing sufficient: It is the judgment, order and sentence of the Court that you, HUBERT RAY STID-

HAM, for the crime of which you have been and stand convicted, be imprisoned and confined at hard labor in the State Prison of the State of Florida for a term of 20 years, and you are remanded to the custody of the Sheriff of Broward County, Florida, for safe keeping and delivery to the proper officials of the Division of Corrections of the State of Florida.

DONE and ORDERED this 7th day of October, 1966.

JAMES F. MINNET
Circuit Judge

ADDITIONAL GROUNDS IN MOTION FOR NEW TRIAL

COMES NOW, the Defendants, JOHN PHILEMON LUKE II, by his Attorney Ives and Davis and Steadman S. Stahl, Jr. and JOHN FRANCIS HENRY and HUBERT RAY STIDHAM, by and through their Attorneys, Houston, Easthope and Stahl, and files their Additional Grounds in Motion for New Trial, and sets forth the following:

1. The Defendants reallege and reaffirm all the grounds in Motion for New Trial previously filed.

2. The Court committed error in denying Defendants Motion for Severance.

3. The Court committed error in failing to charge the jury as to the necessary elements to be proven in order to sustain a verdict of Murder in the Third Degree.

4. The Court at a pre-trial hearing on Defendant's Motion for Bill of Particulars committed error in failing to enter an order on the same.

5. The Court committed error by permitting the State to rely on the Felony Murder Doctrine to convict the Defendants of Third Degree Murder after the Court had previously ruled that the State could not rely on the Felony Murder Doctrine to convict the Defendants of First Degree Murder.

CERTIFICATE

I HEREBY CERTIFY that copy of the foregoing Additional Grounds in Motion for New Trial has been furnished by MAIL to the Honorable HUGH S. GLICKSTEIN, Assistant States Attorney, Broward County Courthouse, Fort Lauderdale, Florida, this 9th day of July, A. D., 1966.

STEADMAN S. STAHL, JR.
Of Counsel

MOTION FOR NEW TRIAL

COME NOW, the Defendants, JOHN FRANCIS HENRY and HUBERT RAY STIDHAM, by and through their undersigned Counsel, and respectfully request this Honorable Court to grant a New Trial in the above-styled cause for the following reasons:

1. That the verdict of the Jury and the Judgment of the Court are contrary to the law.

2. That the verdict of the Jury and the Judgment of the Court are contrary to the evidence.

3. That the verdict of the Jury and the Judgment of the Court are contrary to the law and the evidence.

4. The Court committed error in denying the Defendants: STIDHAM and HENRY, Motions for directed verdict of not guilty made at the close of the State's case and again at the conclusion of the entire case.

5. The Court committed error in not permitting defense witnesses, ROBERT JAMES WALKER, HOWARD HOAK GEER, JIMMY KEITH GALLAGHER, CHARLES KENNETH SMITH and PAUL JONES MAHONEY, to testify on direct examination as to the charges placed against them as a result of their part in the shooting of CATILINA FLORES.

6. The Court committed error in denying Defendant, HUBERT RAY STIDHAM'S, Motion for Mistrial, made during the course of defense witness, SMITH'S, testimony when on cross-examination he made some reference concerning a statement by STIDHAM on his (Stidham's) "going back to Raiford."

7. The Court committed error in failing to instruct the Jury on HENRY'S right not to take the stand.

8. The Court committed error as to the Defendant, JOHN FRANCIS HENRY, in failing to instruct on the crimes of aggravated assault, assault and battery, simple assault, conspiracy to commit murder in the first degree, conspiracy to commit murder in the second degree, conspiracy to commit murder in the third degree, conspiracy

to commit aggravated assault, conspiracy to commit assault and battery and conspiracy to commit simple assault.

9. The verdict of the Jury as to both the Defendants, JOHN FRANCIS HENRY and HUBERT RAY STIDHAM, is contrary to the overwhelming weight of the evidence.

ORDER

This cause coming on to be heard pursuant to Motion for New Trial and it having had added to it additional grounds on Motion for New Trial, before the undersigned Circuit Judge on Tuesday, September 6, 1966, in the Court Room at Broward County, Florida; all parties to this proceeding having agreed that these Motions might be heard in Broward County, Florida as a convenience to all the parties. Hugh S. Glickstein appeared as Assistant State Attorney, JOHN PHILEMON LUKE II, was represented by his attorneys Ives and Davis and Steadman S. Stahl, Jr., and JOHN FRANCIS HENRY and HUBERT RAY STIDHAM were represented by their attorneys, Houston, Easthope and Stahl.

While the Motions presented several grounds of error, one error was particularly emphasized having to do with the reliance upon the State on the Felony Murder Doctrine. In reviewing this matter, including all of the motions for error, the Court finds that error has not been committed.

WHEREFORE, it is

ORDERED and ADJUDGED that the above entitled Motions for New Trial on behalf of the above named Defendants be and they are hereby denied.

(CAPTION OMITTED)

GROUNDS FOR APPEAL AND ASSIGNMENT OF ERROR

COME NOW, the Defendants, JOHN PHILEMON LUKE II, by and through his Attorneys, IVES & DAVIS, and STEADMAN S. STAHL, JR., and JOHN FRANCIS HENRY, a/k/a Chico, and HUBERT RAY STIDHAM, by and through their Attorneys, HOUSTON, EASTHOPE & STAHL; and they file this, their Grounds for Appeal and Assignment of Error in the above-styled cause.

For reason thereof, they set forth the following:

1. The verdicts, judgments and sentences of the Court are contrary to the law.

2. The verdicts, judgments and sentences of the Court are contrary to the evidence.

3. The verdicts, judgments and sentences of the Court are contrary to the law and the evidence.

4. The Court committed error in denying Defendants' Motions for Directed Verdict of Not Guilty made at the close of the State's case and, again, at the conclusion of the entire case.

5. The Court committed error in not permitting defense witnesses, ROBERT JAMES WALKER, HOWARD HOAK GEER, JIMMY KEITH GALLAGHER, CHARLES KENNETH SMITH and PAUL JONES MAHONEY to

* * *

14. The Court committed error by permitting the State to rely on the Felony Murder Doctrine to convict the Defendants of Third Degree Murder after the Court had previously ruled that the State could not rely on the Felony Murder Doctrine to convict the Defendants of First Degree Murder.

ADDENDUM

Excerpt from petition for re-hearing, Fourth District, Court of Florida.

The Jury in exercising their prerogative has by its findings, precluded a conviction of murder in the 2nd degree.

A Jury's verdict should not be tampered with and section 919.14 of the Florida Statutes which permits such is unconstitutional for that reason.

The Appellants Henry and Stidham have been denied a right to a Jury trial.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 221

HUBERT RAY STIDHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

EARL FAIRCLOTH
Attorney General
Tallahassee, Florida

CHARLES W. MUSGROVE
Assistant Attorney General
321 Pan-A Building
West Palm Beach, Florida

Counsel for Respondent

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OPINIONS BELOW

Denial of Certiorari by the Florida Supreme Court is reported at 210 So. 2d 223.

JURISDICTION

This Court is without jurisdiction to consider this Petition for Writ of Certiorari because the Petition to Extend Time

for Filing was not timely filed. The decision of the Florida Supreme Court became final on February 14, 1968. The time for filing Petition for Writ of Certiorari or Petition for Extension of Time expired on May 14, 1968, pursuant to Rule 22.1 of this Court. The Petition to Extend Time for Filing was filed on May 22, 1968, and was granted with the express provision that this Court reserved the right to determine that the application had not been timely filed. As Rule 34.2 of this Court requires that said application for extension of time must be filed before the ninety day period has expired, said application was not timely filed and this Court is without jurisdiction to consider the instant Petition for Writ of Certiorari.

Further, the Extension of Time granted was only until June 15, 1968, yet the Petition for Writ of Certiorari was not filed until June 22, 1968.

QUESTION PRESENTED

WHETHER AN ACCUSED IS DENIED HIS RIGHT TO TRIAL BY JURY WHEN A JURY WHICH AGREES THAT THE ACCUSED IS GUILTY OF AN UNLAWFUL HOMICIDE IS PERMITTED TO MITIGATE THE DEGREE OF GUILT?

CONSTITUTIONAL PROVISIONS INVOLVED

The seventh Amendment to the Constitution of the United States, which provides as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

is not adequately set out in the Petition for Writ of Certiorari.

STATUTES INVOLVED

Section 919.14, Fla. Stat., provides as follows:

> "If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

ARGUMENT

AN ACCUSED IS NOT DENIED HIS RIGHT TO TRIAL BY JURY WHEN A JURY WHICH AGREES THAT THE ACCUSED IS GUILTY OF AN UNLAWFUL HOMICIDE IS PERMITTED TO MITIGATE THE DEGREE OF GUILT.

Petitioner alleges that his right to jury trial was infringed upon by the District Court of Appeal, Fourth District, because that court affirmed his conviction for third degree murder on the basis that the evidence would support a verdict of guilty of second degree murder. Obviously, Petitioner did receive a trial by jury, and it is he who sought to overturn the verdict.

Pursuant to Section 919.14, Fla. Stat., the trial court had no alternative save to instruct the jury regarding each degree of murder and to give the jurors the option to determine the degree, *Wilson v. State* (Fla. App. 1965) 171 So. 2d 903 at 905.

It appears that Petitioner's real challenge is to the constitutionality of this statute. He says he raised a federal question in the State Courts, yet he reserved his challenge until after the jury had been instructed, after arguments had been presented to the District Court of Appeal, even though the State's position was clear, and until after the appellate court had ruled. It is respectfully suggested that Petitioner did not properly present his federal question in the State courts.

In any event, Petitioner claims violation of his federal right to jury trial under the Sixth Amendment. The Sixth Amendment guarantee of a jury trial was first held applicable to the states through the Fourteenth Amendment in *Duncan v. Louisiana* (1968) 391 US 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444. That decision does not apply to trials commencing prior to May 20, 1968, *DeStefano v. Woods* (1968) ____ U.S. ____, 20 L.Ed. 1308, 88 S.Ct. ____. Therefore, assuming arguendo that some violation of the right to jury trial occurred, no federal question is presented by that allegation.

Petitioner suggests that the Seventh Amendment, which has never been made applicable to the states through the Fourteenth, restricts appellate tampering with issues tried by jury. This would hardly be an appropriate case for an initial application of the Seventh to the states, since by its terms it applies only to civil cases involving money claims.

In affirming Petitioner's conviction, the District Court of Appeal, Fourth District, did nothing more than to apply the well established Florida rule that a person found guilty of an unlawful homicide may not complain that there is no evidence

of the degree of guilt assessed where a higher degree of guilt could have been assessed by the jury. The rule is enunciated in *Johnson v. State* (Fla. 1908) 46 So.174, and *Clemmons v. State* (Fla. 1901) 43 Fla. 200, 30 So.699. The rule is not unique to Florida, see e.g., *Blankenship v. Commonwealth* (Va. 1952) 193 Va. 587, 70 S.E. 2d 335 at 338, *State v. McQuerry* (Mo. 1966) 406 S.W. 2d 624 at 627.

The reason for this rule is well expressed in *McCoy v. State* (Fla. 1898) 40 Fla. 494, 24 So.485 at 488, where the court stated:

> "The jury is required to determine whether defendant has committed an unlawful homicide, and, if so, to declare by their verdict what degree thereof. They should truly find that degree, and that only, which, under the law, is applicable to the proven facts; and if they err in this, and injury results to the defendant, he is entitled to a new trial, or to a reversal of the judgment on appeal. It often happens, however, that juries, through sympathy, inadvertence, misapprehension, failure to properly discriminate or by reason of a desire to mitigate punishment, or from various other causes, do not truly ascertain by their verdict the degree of unlawful homicide of which the defendant, under the law, is guilty; and in all such cases the question arises whether the defendant is entitled to a new trial because of such error. Whenever the jury assign his offense to that class or degree carrying a heavier punishment or greater moral turpitude than the one to which, under the facts, it should have been assigned, the answer is plain. The injury to defendant being apparent, the verdict ought not to stand. When, however, the verdict assigns the defendant's offense to that degree or class where the moral turpitude is no greater, and the punishment is less, than it would have been had the verdict specified the proper degree or

class of the offense, he is not injured, but is benefited, by such error; and there is no reason why he should derive a further benefit from an error in his favor."

Thus, the rule recognizes that juries do not always follow the instructions they are given. This rule is designed to assure that though a jury be instructed that it should find the accused guilty if the State proves its case, that the jury will not refuse to follow this instruction because of the high price the accused might have to pay, but may mitigate to a degree of guilt more acceptable to them. This Court has had occasion of late to recognize that juries do not always follow instructions designed to protect the accused, in *Jackson v. Denno* (1964) 378 US 368, 12 L.Ed. 2d 908, 84 S.Ct. 1774, and *Bruton v. United States* (1968) ____ U.S. ____, 20 L.Ed. 2d 476, 88 S.Ct. 1620. This Court should also be willing to recognize that the jury does not always follow instructions given on behalf of the State. When a jury finds the accused guilty, but mitigates his degree of guilt, the accused should not be permitted to take advantage of the tenderness of the jurors beyond the boon already granted.

Though Petitioner claims a violation of his right to jury trial, a careful reading of his argument seems to reflect that he is really challenging the sufficiency of the evidence to sustain his conviction. Sufficiency of the evidence is not a federal question unless there is no evidence of guilt, in which case due process is violated, *Garner v. Louisiana* (1961) 368 US 157, 7 L.Ed. 2d 207, 82 S.Ct. 248.

Petitioner's challenge to the sufficiency of the evidence is invalid. He claims that there was no evidence that he and his

colleagues acted with depraved minds, yet it is difficult to comprehend what sort of reasoning could lead sixteen people, armed with two guns, an axe, a baseball bat, and a billy club and a tire iron to go out to a Puerto Rican labor camp "to assure a fair fight." Not content to lend his person as a bodyguard and his gun, Petitioner and his co-defendants went up to the house. Petitioner told Purkhiser an occupant was armed, knowing full well that Purkhiser had his gun. There can be no doubt that an unlawful homicide occurred and Petitioner aided and abetted in the crime.

Petitioner has contended at all times that there was no possible way for him to be convicted of murder in the third degree on the evidence. Surely he cannot doubt that he was really believed guilty of second degree murder, but the degree of guilt was mitigated to third degree murder. Nor would this be surprising. Though Petitioner does not seem a person likely to attract jury sympathy, it cannot be doubted that he and his companions did not intend the tragic results of their efforts that night. The jury could well have felt that some mercy should be shown to one so young who was, to some extent, the victim of circumstances he helped set in motion but could not fully control.

Petitioner seeks comfort in the decision of the Florida Supreme Court in *Purkhiser v. State* (Fla. 1968) 210 So. 2d 448. Though that case arose out of the same factual situation, it is evident that it was an entirely separate case. The evidence admitted at Purkhiser's trial obviously would not be exactly the same as that admitted at the instant trial.

Assuming there were some relevancy to *Purkhiser v. State*, supra, it cannot avail Petitioner. Actually the Supreme Court of Florida did nothing more than to direct a verdict of not guilty as to the charge of first degree murder. They did not remand for a new trial, but rather, remanded for sentence on second degree murder. Inasmuch as Petitioner and his co-defendants were charged with aiding and abetting Purkhiser, they should obviously be guilty of the same crime as he was. The only difference is that the trial judge directed the verdict of not guilty as to first degree murder as to Petitioner, while the Supreme Court of Florida had to do so for Purkhiser.

CONCLUSION

It is respectfully suggested that there is not really any federal question presented here. Petitioner claims that his right to jury trial was infringed upon, yet, he seeks to challenge the results of his jury trial. His conviction constitutes a mitigation as to degree of guilt following an agreement of the jury on his guilt. This is not an infringement of his right to trial by jury.

Petitioner's effort to challenge the sufficiency of the evidence to sustain his conviction does not raise a federal question and even if it did, his contention would fail because the evidence is sufficient to sustain his conviction viewed in the light of the mitigation as to the degree of guilt.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
Tallahassee, Florida

By _____
CHARLES W. MUSGROVE
Assistant Attorney General
321 Pan-A Building
West Palm Beach, Florida

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Florida and Fourth District Court of Appeal of Florida, was furnished Honorable John M. McCants, 301 Blount Building, Fort Lauderdale, Florida 33301, and Honorable Neal F. Rutledge, 601 Flagler Federal Building, 111 Northeast First Street, Miami, Florida 33132, this _____ day of _____ 1968.

CHARLES W. MUSGROVE

of Counsel